92-306

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JEROME B. ROSENTHAL,

Petitioner,

vs.

ROBERT NOLAN CONRAD, A LAW CORPORATION, ROBERT NOLAN CONRAD, AND HARLAN N. GREEN, A PROFESSIONAL CORPORATION

(Real Parties In Interest)
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT

(AND TO THE CALIFORNIA SUPREME COURT)

JEROME B. ROSENTHAL, Pro Se
PETITIONER
Los Angeles County
(Central) Jail
Booking # 2502-015
Dorm 7022
P. O. Box 86164
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Los Angeles, CA
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QUESTIONS PRESENTED

1. When petitioner is given no notice of combined oral argument and hearing on (1) appeal from state trial court's substantial, adverse judgment and (2) on motion for sanctions for allegedly filing extraordinary writ petitions (in state court of appeal and state supreme court) seeking petitioner's release from incarceration for contempt in post judgment debtor examination, are appellate court actions (1) affirming judgment and (2) imposing sanctions on petitioner, void, null, or otherwise unenforceable against petitioner, as being repugnant to U.S. Constitution, 14th Amendment, guaranteeing petitioner's rights to notice and hearing?

2. Does the Court of Appeal's action in permitting petitioner's counsel (who has filed a Motion for leave to withdraw, to which petitioner filed his verified evidentiary

response agreeing that counsel should withdraw, and describing inter alia, counsel's unethical and deceptive conduct and his pervasive, gross incompetence) to continue to represent petitioner (without petitioner's knowledge) at oral argument on appeal and on adverse party's motion for sanctions for allegedly frivolously seeking release from incarceration for contempt, impermissably deprive petitioner of right to effective counsel and self-representation under U.S. Constitution's 6th or 14th Amendments?

3. Do these circumstances and actions reflect Appeal Court's bias, prejudice and lack of impartiality to such degree that petitioner's right to protection against arbitrary judicial action is sacrificed:

(a) Court disposition penalizes petitioner for improper acts of his attorneys, without any evidence of petitioner's approval or knowledge of

those acts,

(b) Court criticizes and penalizes petitioner for his position taken in prior matters (totally unconnected with current case) before the same court,

(c) Court ignores unchallenged and uncontradicted evidentiary posit of petitioner that his counsel deceived court in pertinent, crucial respects, and

(d) Court ignores unchallenged and uncontradicted competent evidentiary posit of petitioner that adverse party's counsel deceived and misled court(s) in relevant respects involving falsification of jurisdictional facts and grants sanctions to the culpable attorney and his client, against petitioner, and constitutes deprivation of procedural due process under U.S.

Constitution 14th amendment?

4. Does state lower appellate court's (California Court of Appeal) action in violation of stare decisis doctrine, constitute a 14th amendment due process denial against aggrieved party who is denied access to court by that appellate court action?

LIST OF PARTIES

The parties to the proceedings were the petitioner Jerome B. Rosenthal and the respondents Robert Nolan Conrad, A Law Corporation, Robert Nolan Conrad, and Harlan N. Green, A Professional Corporation.

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vs.

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(Real Parties In Interest)
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT

(AND TO THE CALIFORNIA SUPREME COURT)

PETITION FOR WRIT OF CERTIORARI

Petitioner, Jerome B. Rosenthal, respectfully requests that a writ of certiorari issue to review the judgment (entered May 13, 1992) of the California

Supreme Court, denying the petition for review of the appeal (and motion for sanctions) of the California Court of Appeal Judgment affirming. . . and order awarding sanctions, both entered February 6, 1992.

OPINIONS BELOW

The decision of the California Supreme Court filed May 13, 1992 (App. A) is a denial, without opinion, of petitions for review of judgment and sanctions orders of California court of Appeal (No. B050759, SO25706) entered February 6, 1992 (unpublished) App. B & C, respectively.

JURISDICTION

The judgment and order of the California Court of Appeal was entered on February 6, 1992, rehearing denied. Timely petition for review was denied by California Supreme Court on May 13, 1992 (entered).

March 1992 - Cal. Court of Appeal- order denying petition for rehearing of its judgment, order of February 6, 1992.

This Court has jurisdiction to review the judgments, orders of Cal. Court of Appeal (and of California Supreme Court) under 28 U.S.C. Section 1257.

CONSTITUTION, STATUTES, AND COURT RULES INVOLVED

-U.S. Constitution:

ARTICLE VI "This constitution and the laws of the United States. . .made in pursuance thereof. . ., or which shall be made under the authority of the United States, shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding."

AMEND. V "No person shall...be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law..."

AMEND VI "In all criminal prosecutions, the accused shall enjoy the right. . .to have the assistance of counsel. . ."

AMEND VIII "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

AMEND XIV, Sect. 1 ". . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA CONSTITUTION - (See App. L)

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Rules 24(a), 26, 41,

2nd Dist., Ct. Appeal, Division Five

(ORAL ARGUMENT)

STATEMENT OF THE CASE

Petitioner was founder and head of Rosenthal, Cook and Green (RCG), a law partnership formed in 1961. In 1963, petitioner's close friends and current and former clients, engaged petitioner and RCG to recover their claimed inheritances. The clients (H's) had made many unsuccessful efforts to recover through other attorneys, for the preceding 20 years. The 1963 contingent fee agreement in which H's engaged RCG provided that clients (H's) looked to

petitioner primarily and personally to undertake and supervise the project and accorded to petitioner, over others in RCG firm, the benefits that could or might materialize if the undertaking were successful. To recover the inheritance property, the clients and petitioner's firm had to prevail over all other parties claiming the same property, several conditions had to be met and fulfilled, obstacles had to be removed or overcome, and certain events had to occur.

In 1963, Respondent Conrad was 16 years old, and a total stranger to the H's, to petitioner, and to RCG firm. (Description of Conrad's actions is resumed infra.)

The litigation instituted by RCG for H's (state and federal courts, California and Pennsylvania) culminated in a 1964 partial settlement: H's stepmother, an adverse claimant, agreed that upon her death, all of her claims to the subject property would go to

whichever claimant(s), including H's, prevailed over other claimants, etc; the first event or step necessarily to occur for H's to possibly succeed was to be the demise of their stepmother, one "V", an elderly lady.

Thus, for about 20 years, (Cook withdrew from RCG in 1965. Respondent Green left in 1968.) petitioner and Cook remained alert and ready to perform all of the remainder of the services that had to be performed to prevail over other claimants and to remove the expected obstacles, in order for H's to recover, and for any fees to thus become due from them.

In 1973, Rhoads agreed to represent petitioner in litigation against "Day", a former client; a professional (law) corporation was formed, "Rosenthal and Rhoads." In 1974, Rhoads quit, during the "Day" trial. Seltzer took over - and incidentally acquired Rhoads' stock in the law corporation, for $1,000. In March, 1975, Day

procured a multimillion dollar judgment against petitioner, which was settled by petitioner's insurers.

Petitioner had met respondent Conrad socially. At the request of his friend (then Conrad's mother-in-law), in 1975, petitioner agreed to take Conrad, an inexperienced, young lawyer, under his experienced wing. The vehicle of the professional law corporation, then known as Rosenthal and Seltzer, was to be used; Conrad acquired Seltzer's stock for the nominal sum of $6,000, actually to be derived from the corporation (i.e., not Conrad's own funds), plus contingent amounts that may (or may not) become due only out of certain rights of the corporation, if and when, if ever, the rights were realized; the contingent amounts could not exceed $24,000, and also would not come from Conrad's own funds.

In July 1983, "V" died. Although not true at the time of her death, some months later the principal adverse (to the H's)

claimant waived his rights, other claimants "surrendered", other obstacles were removed and conditions met- so that the H's would recover and the contingency fee due from the H's became due.

At this point, respondent Conrad suddenly and surprisingly claimed that he, not petitioner, would own the rights to the fee to be paid by H's.

Without the knowledge of petitioner, respondent Green "joined forces" with respondent Conrad. They then secretly entered into an agreement with the H's; the H's placed about $2 1/4 million in a trust, to be paid to the "winner" of the dispute or litigation between petitioner, and respondents Conrad and Green. (Cook, with petitioner's approval, had been paid his share of the fee - and was not involved in the dispute or in the entrusted funds.)

Conrad and Green brought suit against petitioner Rosenthal,in the Los Angeles County

Superior Court - for declaratory relief (who owned the funds deposited [1]/ by H's into the trust) and damages. Petitioner cross-complained (L.A.S.C. No. C 545 108).

In May 1989, (confirmed by agreement May 18, 1989) petitioner engaged attorneys Arnold G. Regardie and Edwin J. Klein, Jr., with whom Regardie had associated especially for the matter, to represent petitioner in the Conrad, Green litigation. (The May 18, 1989 Agreement is Exh. A to App. E.

On August 20, 1991, Regardie filed in the California Court of Appeal a Motion to withdraw as attorney for petitioner Rosenthal, in the Conrad, Green litigation case and matters, saying "Accordingly, Mr. Regardie can no longer continue to represent Mr. Rosenthal" (p. 2, of Motion, App. E). (Regardie's similar motion to withdraw had been granted by, and as to Superior Court.)

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[1]/By May 1992, it was estimated that the deposited sum had increased to over $3 million, from investment yields.

September 9, 1991, Petitioner Rosenthal filed, in California Court of Appeal his "...Response to Motion...of...Regardie to withdraw...(App. F) Exh. 5 to App. F is Regardie's letter to Mr. Mann (Conrad's Attorney) June 25, 1991 referring to "Appellant's (Regardie's) opening and closing briefs and stating that the appeal is "eminently meritorious", predicting that Court of Appeal will reach the same conclusion, and that Court of Appeal will also conclude that Mann has made "misstatements of the record."

(In February, March 1990, L.A. Superior Court had ~~entered its~~ judgment in favor of Conrad and Green, against Petitioner, based on jury verdict awarding "entrusted" fee paid by H's to Conrad, Green, and awarding compensatory and punitive damages to Conrad. Regardie as chief, lead counsel, with Klein represented petitioner throughout the "lengthy trial." (App. B, p. 7))

One year later, i.e. on March 5,

1991, Hon. Stephen O'Neil, Judge (L.A. Superior Court) found petitioner in contempt of "Commissioner(s) "orders" (purportedly) issued 11/14 and 11/21 1990, to answer the questions with respect to the judgment debtor's examination conducted by Conrad (Mann), as judgment creditor. Judge O'Neil ruled that "The Fifth Amendment privilege [sic] does not apply" in judgment debtor proceedings and ordered petitioner committed to Sheriff (Jail), staying incarceration pending "a writ of mandate as applied for by the contemptnor [sic]". (App. G - 3 pp.) Actual incarceration began April 8, 1991 (Petitioner still in L.A. County Jail - some 16 months later), per Reporter's Transcript, O'Neil, J. L.A. Superior Court, App. H).

Regardie, Klein filed (Cal. Court of Appeal) Petition (3/25/91 for writ of mandate, etc. summarily denied, and, on April 8, 1991 filed petition for stay and relief in Cal. Supreme Court (App. C pp.1,2), summarily

denied April 18, 1991 (App. J), without prejudice to Real Parties' seeking sanctions in Court of Appeal - for the filings in Court of Appeal and Supreme Court, under Section 907, Code of Civil Procedure, Business and Professions Code, Section 6068, subd. (d), Cal. Rules of Court, rule 26(a).

In opposition, the Regardie/Klein Petition in the California Supreme Court for stay and review of the March 5 and April 8, 1991 contempt order and incarceration hearing (Judge O'Neil), Conrad stated that Petitioner had "stipulated" that Commissioner referred to by O'Neil March 5 order, could act as a judge, and thus had jurisdiction to "order" and rule regarding 5th amendment privilege availability).

Regardie/Klein **prepared** (for filing in Cal. Supreme Court, "Reply of Petitioner to Opposition of (RPI) to Emergency Habeas Corpus, Certiorari Petition For Review Of Contempt Order" dated April 18, 1991. (Exh. F

to App. F). In that Reply, Regardie/Klein flatly stated that Conrad/Mann's statement that petitioner (through counsel Regardie/Klein) had "stipulated" to Commissioner Taylor was "false". (App. F, Exh. F, p. 1:21 - 3:5).

But, Regardie/Klein did not file the "Reply" because they were too late. The Supreme Court had already "decided" against petitioner - without knowing that (i) since there had been "no stipulation", there was no jurisdiction, without knowing (ii) of other infirmities of the contempt findings and incarceration, and (iii) of petitioner's contentions against sanctions in favor of Conrad or of (iv) Petitioner's request for sanctions against Conrad/Mann for the falsity and its consequence. (App. F, Exh. F, p.3:16 - p.5:4.)

RE: "Federal Questions Raised" - (See App. O-

:

PETITION FOR REVIEW, CAL. SUPREME COURT - (dated March 15, 1992-) CAPTION SHEET AND VERBATIM: "ISSUES FOR REVIEW" Nos, 1, 3, 5, 7, and pp. 5-16 incl.)

The federal questions were raised in Petitioner's Petition for Review in California Supreme Court (App. O) - because some of the issues had arisen only <u>after</u> the Court of Appeal had denied both notice and hearing to Petitioner by conducting ORAL ARGUMENT on Appeal from Superior Court Judgment and on motions for sanctions for alleged bad faith writ petitions to California Court of Appeal and Supreme Court.

The oral argument/hearing was conducted on December 4, 1991 without any notice to Petitioner. Petitioner's adversaries (former counsel, and counsel for adverse party RPI in the case) appeared and argued, gave evidence (Declaration of Regardie). Petitioner did not learn of advent

of oral argument (December 4, 1991) until after appeal and sanctions had been decided! (February 6, 1992), Petitioner's first information of any kind, by happenstance- occurred some **weeks after** February 6, 1992 decision of Court of Appeal. Thus, petitioner had no notice, did not appeal, had neither effective counsel nor self-representation right or opportunity - although his "pro per" status was known to the Court of Appeal. (Petitioner's Reply to Regardie's Motion in Court of Appeal, to withdraw, See App. F.

The federal questions were also raised in the trial court (L.A. County Superior Court), i.e., privilege against self-incrimination, and federal supremacy. Please see App. G and H, minute order of contempt rules that self-incrimination "not applicable", and actual incarceration proceeding of April 8, 1991, respectively. Also, please see App. C - Court of Appeal Decision.

The foregoing references to California Courts (of Appeal and Supreme Court) Petitions and to Trial Court proceedings will show that the federal questions were raised properly and timely so as to give this court jurisdiction to review on certiorari writ.

At this juncture, the case presents for consideration, the seminal subjects, inter alia, of whether the state appeal court's action reflects its bias and lack of impartiality (induced by petitioner's adversaries, and by his former counsel, or by Court's apparent and hostile predispositions against petitioner) so as to reach constitutional dimensions, and whether that action is repugnant to the elements of substantive and procedural due process guarantees.

Respondent Conrad's Mr. Mann falsely tells Court (Appeal) that Petitioner "stipulated" to jurisdiction - requiring

Commissioner's acting as judge; petitioner's former counsel Regardie fails and refuses to admit (actually conceals) and cites his associate counsel's derelictions, which mislead Court to believe that Commissioner had jurisdiction when, in fact, he did not; the Court of Appeal inordinantly delays its ruling granting Regardie's Motion to withdraw for six months (August 1991 to February 10, 1992) in order to permit him to appear at hearing to brief appeal, knowing of tacit if not functional, and undisputed cessation of his representing petitioner, to whom he has become adverse and admittedly severely hostile. Since Regardie's associate counsel E.J. Klein died suicidally in September 1991, no attorney except petitioner's opponents were present at dispositive hearing, oral argument. Petitioner was not represented, nor "heard" and was deprived of notice and of due process right to counsel per se, and in pro per. This paragraph portrays some of the facts of and

surrounding the ultimate court action consisting of the judgment and order of the state court to be considered by this Court in determining propriety of issuing its writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Case Presents Important Questions Of Constitutional Law Which Only This Court Can Resolve And Clarify:

State Court decisions labelling and determining reliance upon self-incrimination privilege conflicts with due process precedents of this Court. The federal standard of determination of availability of the 5th and 14th Amendments guaranty against self-incrimination, must and do control.

> Zonver v Superior Court
> 270 Cal.App.3d 613, 620-621, 624, citing and adopting
> Malloy v Hogan,
> 378 U.S. 1

Failure of some state courts to apply

federal standard has resulted in a confusing disarray of decisions concerning liberty and property interests of individuals. Some of the decisions fall on one side, the remainder on the other side, of the rule that makes the privilege more or absolutely available where there is in effect specific statute(s) like California's Penal Code Sections 154 and 155 (criminal offense to transfer or conceal assets). This Court should proclaim such cases under such specific statutes as being a part of the federal standard, in order to insure requisite uniformity. The increasing confusion, and the societally indispensible doctrine of federal supremacy loudly cry out for uniformity and clarification indispensable to tranquility and orderliness.

The "specific statute cases" are best exemplified by the venerable landmark **Ex Parte Clark** (1984) 103 Cal. 354, which is controlling law for the indicated century. It flatly decides on facts strikingly similar to

instant, that the existence of Penal Code's 154 and 155 - preclude judgment debtor's being compelled to answer in any proceeding as to acts which may constitute an offense under such statutes. See also **People v Whelchel** (1967) 255 Cal.App.2d 455, 460; **In re Gault**, 387 U.S. 1, 47-48, 18 L.Ed.2d 527, 557, 89 S.Ct. 1428, 1454; **People v Bartzes** (1954) 128 Cal.App.2d 763, 773-775 (sufficient if there **is a law** creating offense under which witness maybe prosecuted); **Cohen v Superior Court**, 173 Cal.App.2d 68 (witness need not conclusively demonstrate that the answers to questions will make him subject to prosecution.)

In addition to the disparate and conflicting principles as between courts deciding cases where there is, and those deciding cases where there is not, an existing state statute under which a witness may be prosecuted for the statutory offense, there is another level at which confusion exists. Here, the trial court (minute order March 5,

1991) ruled that self-incrimination privilege does not apply in judgment debtor examinations, but the Court of Appeal (Opinion filed February 6, 1992) ruled, to the exact opposite, that the self-incrimination privilege **does** apply in judgment debtor proceedings.

The dominant principle (federal standard) that needs this Court's emphasis and fortification is exemplified in **Hoffman v U.S.** (1951) 341 U.S. 479, 486-487 - which holds that the privilege is available **unless** it is perfectly clear that the witness **cannot possibly** have tendency to incriminate.

In sum, each of the four Questions Presented, demand resolution. They spell out appalling possibilities of deprivation of fundamental, time-honored, consitutional rights.

One more "reason for grantirg" should be mentioned. California's Supreme Court has decided that a prisoner must be accorded the

right "to appear" in Court, at hearing in a civil case involving his property. **Payne v Superior Court**, 17 Cal.3d 908. Payne explicitly refrains from determining that in such cases, the "right to appear" means the right to be physically present in the court at the dispositive hearing. The decision leaves open and undecided, the question of the form which the right to appear must take. That frontier should now be considered by this Court - . Petitioner here has ben denied any opportunity "to appear" at the hearing (December 4, 1991) of Court of Appeal, although his liberty, as well as his substantial property interests were at stake. He lost both - and was punished for urging his rights!

(Please see App. P for further extension of the above "reasons" for granting the writ.)

Please Note: The principles above

showing reasons why the writ should be allowed, although material, relevant and in need of this Court's stabilizing and clarifying intervention, those principles are urged for limited purpose(s). Petitioner does not seek determination on the merits of the individual facts or detailed consideration of the merits of the affirming of underlying judgment or of the imposition of writ-generated sanctions.

Those principles, although ideologically pertinent, are of broad and compelling material importance, are urged to demonstrate the denials of constitutional rights ultimately violated by Court of Appeal actions of February 6 (and February 10) 1992, and actions leading to them. The question of the availability (by such means, per se, of extraordinary writ proceedings in state courts (later, possibly, in federal courts) can be resolved in those courts, since the previous determinations of writ proceedings are

implicitly not res judicata.

But this Court should now grant the writ to decide such pervading questions of universal significance as are referred to in the Statement of the Case - and not fully stated here to avoid repetition.

Whether Petitioner was correct in trial and appeal courts, there remain the potent questions of whether starting with appeal (with the blessing of Supreme) the constitutionally guaranteed rights of which petitioner was deprived by the upper court actions demand that the writ be allowed and the judgment and orders be reversed. Only then can such fundamental due process rights as notice and hearing, impartial judiciary, right to effective counsel, and freedom from arbitrary state action and right to meaningful process, right to rely on federal supremacy, be secured.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Dated: August 10, 1992.

Respectfully submitted,

JEROME B. ROSENTHAL
Petitioner, Pro Se

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APPENDIX

A. Order of California Supreme Court, filed May 13, 1992

Second Appellate District, Division Five, No. B050759
S025706

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
MAY 13 1992
Robert Wandruff Clerk
DEPUTY

ROBERT NOLAN CONRAD Et Al., Respondents

v.

JEROME B. ROSENTHAL, Appellant

Appellant's petition for review DENIED.
Mosk, J. did not participate.

Chief Justice

BEST AVAILABLE COPY

APPENDIX

B. Opinion, Court of Appeals,
filed February 6, 1992

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIF.

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROBERT NOLAN CONRAD, et al., Plaintiffs and Respondents v. JEROME B. ROSENTHAL, Defendant and Appellant.	2d Civil No. B050759 (Sup.Ct. No. C545108) Court of Appeal Second District Filed Feb. 06 1992

ROBERT N. WILSON Clerk

E. AMOS
Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald Cappai, Judge. Affirmed.

Arnold G. Regardie and Edwin J. Klein, Jr. for Defendant and Appellant.

Fierstein & Sturman, Robert S. Mann, Bess Blank and Gregg A. Martin for Plaintiffs and Respondents.

Respondent Robert Nolan Conrad, A Law Corporation, and respondent Harland N. Green, A Professional Corporation, brought a civil action against appellant Jerome B. Rosenthal requesting declaratory relief and damages asserting they were entitled to an attorney fee being held in trust. Also alleged were other causes of action including interference with contractual relations. [1]/ In Rosenthal's cross-complaint he asserted 66 causes of action. Primarily Rosenthal asserted that the fee belonged to him and that if Conrad or his law corporation had title to it, Conrad breached an oral agreement to hold the money in trust for Rosenthal. After a

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[1] Even though the named plaintiffs are corporations, we address the parties as individuals unless the corporate distinction is relevant. Robert Nolan Conrad, A Law Corporation, when relevant, will be referred to as the Conrad Law Corporation.

lengthy trial, a jury determined that Conrad and Green were entitled to the fee. Compensatory and punitive damages were awarded to both Conrad and Green. Additionally, it was determined Rosenthal was entitled to $700,000, an amount Rosenthal had collected from the clients which was not part of the fee. After Rosenthal's post trial motions were denied, he brought the instant appeal.

We affirm and award sanctions on appeal.

FACTS

The parties to this suit are attorneys. The squabble is over who is entitled to a contingent fee earned after performing services for clients in a will contest. The facts span 20 years; the difficulty in understanding the sequence of events is because during these years, numerous attorneys were involved with numerous partnership arrangements, many of whom are not

parties to this suit. Following the usual rules on appeal, we construe the facts in favor of the judgment. (**Aceves v Regal Pale Brewing Co.**, (1979) 24 Cal.3d 502, 507.) For simplicity, we outline the chronology.

In 1961, Rosenthal, Cook & Green form a law partnership of the same name.

On March 28, 1963, Rosenthal, Cook & Green execute a fee agreement with three siblings (Clifford, Dorothy and Nancy) to contest the will of their father, Clifford Heinz, Sr. Any fee derived from the agreement is owed to the law firm. Cook performs virtually all of the work necessary on the Heinz matter, which is resolved by settlement. Before the attorney fee can be paid, certain events must occur, such as the death of Vira Heinz. When paid, the Heinz fee is to be divided among the three partners, each to receive a given percentage as agreed in amendments to their partnership agreement.

In 1965 Cook withdraws from the firm.

Green continues to practice with Rosenthal in the firm of Rosenthal and Green until 1968.

In the early 1970's, one of Rosenthal's important clients, Doris Day, institutes litigation against Rosenthal. Eventually 13 cases are consolidated for trial.

In July 1973, Rosenthal makes an agreement with attorney Rhoads in which assets, including Rosenthal's share of the Heinz fee, are sold to a law corporation named Rosenthal & Rhoads; Rhoads is the owner of all shares of the corporate stock. Rhodes agrees to represent Rosenthal in the litigation between Doris Day and Rosenthal. This agreement also obligates the law corporation to employ Rosenthal, to furnish him with an office and to pay the overhead of that office, including maintenance of the library. Additionally, at the discretion of Rhoads, additional sums can be paid to Rosenthal for

other expenses.

In 1974 Rhoads quits representing Rosenthal.

Attorney Seltzer buys the Rosenthal and Rhoads law corporation for $1,000. Seltzer assumes all obligations of the firm and is the sole owner of the corporate shares. The firm becomes known as Rosenthal & Seltzer.

In March 1975, a multimillion dollar judgment is rendered against Rosenthal in the Doris Day matters.

With regard to disciplinary matters before the State Bar, Rosenthal repeatedly states he is indigent and has no assets.

Seltzer wishes to sell the law corporation. A proposal to sell the law corporation is presented to attorney Linton. The proposal indicates the Heinz fee is an asset of the firm. The sale is not completed.

In September 1975, Conrad agrees to purchase the law corporation, resulting in the transfer of Rosenthal's interest in the Heinz

fee to the Conrad Law Corporation. Rosenthal assists in negotiating the sale and in preparing the sale documents. The sale is completed after lengthy discussions in which Rosenthal states the Heinz fee had been assigned to the corporation in the July 1973, agreement. Additionally, Rosenthal makes a list which includes the fee as an asset of the corporation. The sale agreement lists the Heinz fee as an asset of the corporation; the name of the law corporation is changed to the Conrad Law Corporation. Conrad is the sole owner of this law corporation. Conrad agrees to employ Rosenthal.

Subsequent to 1975, numerous documents prepared by Rosenthal indicate the Heinz fee is owned by Conrad.

In 1979 Dorothy Heinz (one of the clients in the will contest) dies. Rosenthal prepares a contingent creditor claim stating that Conrad owns the Heinz fee; Rosenthal personally files the document in the probate

court.

In July 1983, Vira Heinz dies and the Heinz fee becomes payable. Conrad rejects Rosenthal's request for a substantial sum of money.

Rosenthal sends a letter to the Heinzes stating that the fee should not be distributed to Green or tc Conrad. (Rosenthal did not object to Cook receiving his share; Cook received his part of the fee ($575,000) and Cook is not a party to this suit.)

Conrad terminates Rosenthal's employment.

The Heinzes place $2.225 million in trust, pursuant to an agreement with Green and Conrad.

Rosenthal is paid $700,000 by the Heinzes to settle all claims Rosenthal may have against the Heinzes. Payment is not made for emotional distress suffered by Rosenthal. The $700,000 is not part of the Heinz fee.

In this declaratory relief action,

Conrad and Green contended they were entitled to all of the Heinz fee placed in trust (which excluded the amounts paid to Cook) and that the $700,000 paid to Rosenthal was part of that fee and thus belonged to them. In Rosenthal's answer and cross-action, he asserted the $700,000 was paid to him for emotional distress and that he was entitled to all of the fee. Rosenthal's theory was that the Heinz fee was never transferred to the law corporation in the 1973 agreement, and if Conrad did possess it, Conrad held the fee in trust for him.

After a lengthy jury trial, the jury determined the remaining portion of the Heinz fee totally belonged to Conrad and Green, pursuant to certain percentages; compensatory damages were awarded to Conrad in the sum of $112,360, punitive damages were awarded to Conrad in the sum of $150,000, compensatory damages were awarded to Green in the sum of $21,174, punitive damages were awarded to

Green in the sum of $300,000, and the jury determined the $700,000 was not part of the Heinz fee and that Rosenthal was entitled to that sum.

DISCUSSION

SUMMARY ADJUDICATION

1. Granting of Conrad's Motion

The trial court summarily adjudicated that "Robert Nolan Conrad is the sole owner of Robert Nolan Conrad, a law corporation." We find no merit to Rosenthal's argument that this ruling was error.

A trial court must grant a summary adjudication of issues when a material fact has been shown as a matter of law. In reviewing the evidence presented, all reasonable inferences are to be drawn in favor of the party opposing the motion. A motion is to be denied if a triable issue of fact arises from the facts presented. (Code. Civ. Proc. Sec. 437c, subd. (c); (Albertini v. Schaefer (1979) 97 Cal.App. 3d 822, 831.)

While it is not the province of the trial court to weigh conflicting evidence, a trial court properly excludes declarations of a party submitted in opposition to a motion if those declarations contradict admissions of that party previously given in a deposition. (D'Amico v. Board of Medical Examines (1974) 11 Cal.3d 1, 21-22; Leasman v. Beech Aircraft Corp. (1975) 48 Cal. App.3d 376, 381-383; Hoover Community Hotel Development Corp. v. Thomson (1985) 167 Cal.App. 3d 1130, 1137; King v. Andersen (1966) 242 Cal.App.2d 606, 610.) The procedures for summary adjudication of issues are to limit issues at trial when there are no triable issues of fact. Parties will not be permitted to circumvent these procedures by falsifying declarations in order to create issues of fact. "Where, as here. . .there is a clear and unequivocal admission by [the party], himself, in his deposition . . . we are forced to conclude there is no substantial evidence of the existence of a

triable issue of fact." (King v Anderson, supra, 242 Cal.App.2d at p. 610.)

In support of Conrad's 1988 motion for summary adjudication of issues, Conrad submitted one statement made to the State Bar of California by Rosenthal and excerpts from five depositions taken of Rosenthal in other matters. In all of these statements given under penalty of perjury, Rosenthal explicitly denied owning any assets, including ownership in the Conrad Law Corporation. Rosenthal admitted Conrad owned all of the law corporation.[2/]

[2/] In a July 1979 declaration to the State Bar, Rosenthal contended he was indigent and he requested appointed counsel. Rosenthal declared, "at page 4 of his letter [the State Bar examiner] commences to enumerate the various civil cases in which I am a party. . . . Here again [the examiner] is either wrong on his assumed facts, or unjustified in the conclusions he implies or draws. In the case of Rosenthal, et al v. Wilner, et al., [the examiner] is simply mistaken and wrong in stating that 'my attorney' is Robert N. Conrad, Esq. **Robert N. Conrad Esq., is in fact the sole owner of Robert Nolan Conrad, A Law Corporation.** I am associated as 'of counsel' with that law corporation. The important fact is that Mr. Conrad individually

has nothing to do with the action described. I alone am presently the solely responsible attorney in that action." (Emphasis added.)

In a June 1981 deposition taken of Roenthal in a lawsuit Rosenthal filed against others Rosenthal stated, Q. "Is Mr. Conrad's corporation a stock corporation?" A. "Yes." Q. "Do you own any stock in the corporation?" A. "I do not and it is." Q. Do you know who does own stock in that corporation?" A. "Yes, I do know." Q. "Who are those individuals?" A. "I have been told, but I have never seen the stock. Mr. Conrad owns all of the stock. I know I own none of it. That is not a belief. That is a certainty." Q. "Are you of counsel to Mr. Conrad's firm or an employee?" A. Yes. The former."

In a July 1982 deposition taken of Rosenthal in a lawsuit he filed against others Rosenthal gave extensive testimony about the law firms in which he was affiliated in some manner. Q. "Can you list the names of the firms in which you have been a partner or member, shareholder or employer?" A. "I have never been a shareholder. I have given you the ones that come to mind, in which I have been an employee. . . ."

In a February 1981 deposition taken of Rosenthal in a lawsuit he filed against an insurance carrier, Rosenthal detailed in chronological order the lawyers and firms with which he was affiliated through the years. During this testimony, Rosenthal stated, "The succeeding name was Rosenthal & Seltzer, A Professional Corporation. Name of the corporation merely changed. The name of the third and currently existing corporation was known as Robert Nolan Conrad, A Law

Corporation. I at no time owned any shares of stock in any of these three corporations. On Rhoads -- Rhoads owned all the sock [sic] in the first, Seltzer in the second, and Conrad in the third." In a February 1981 deposition of Rosenthal taken in the same case, Rosenthal testified that he was an "associate" of the Conrad firm. In discussing the flexible fee arrangement he had with the Conrad firm, and the fees involved, Rosenthal said, A. "But it's not my fee. He said your fee; that means my fee. The answer's no." Q. "I intended that to mean you or your law firm." A. "I don't have a law firm."

A third deposition was taken of Rosenthal in the insurance case, in February 1981. In that deposition, Rosenthal discussed his net worth in the following manner: "As to other assets, I have no cash, no bank accounts. I have nominal cash . . . . I have personal property like old furniture. . . . I don't own an automobile . . . . There is a divorce receivership out of which I might have some net recovery but I don't think so. . . . And of course I owe a number of obligations. . . ." Additionally it was stated, Q. "Thank you. Can you tell us that the net value of [your] estate is, roughly?" A. "I think it's a minus but I don't know." Q. "What assets are remaining in that receivership?" A. "There are some relatively limited . . there are some cash equivalent assets. . . . Then there are some other undefined assets which the receiver describes as becoming nominal value. These include small fractional interests in producing wells, and other unknown assets. . . . See, the real estate or interest in real property have been sold years ago." Q. "Aside from the assets you described, are there any other assets which

In opposition to the motion for summary adjudication of issues, and in contradiction to his prior statements, Rosenthal declared that Conrad was not the sole owner of the law corporation; Rosenthal claimed an interest in the corporation. Because his prior statements contradicted the position in his declaration, Rosenthal stated it was permissible to present perjurious testimony when they were only "white lies" and did not hurt anyone.

On appeal, as below, Rosenthal suggests his declaration raised a triable issue of fact. He relies upon Albertini v. Schaefer, supra, 97 Ca,App.3d 822 for this suggestion. Unlike Albertini, however, this

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are in that receivership?" A. "I don't know of any assets." Q. "Aside from the assets that you described today, do you have any other assets now?" A. "I can't think of any at the moment. I might have overlooked something I forgot to tell you, but you assumed, of course, I have some clothes. . . . I have a watch . . . . Nobody is holding any money for me. I have no bank accounts in some other person's name or anything like that."

is not a situation in which a witness gave inconsistent declarations in the same matter. Here, Rosenthal made six unequivocal statements under penalty of perjury asserting he had no assets and that Conrad was the owner of the law corporation. The trial court was correct in concluding Rosenthal's declaration presented in opposition to the summary judgment motion was nothing more than a self-serving perjurious statement formulated in an attempt to raise a triable issue of fact. No reasonable inferences of fact could have been drawn from Rosenthal's declaration to defeat the conclusion that Conrad was the sole owner of the law corporation. The trial court did not err in adjudicating Conrad was the sole owner of the law corporation. [3]/

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[3]/ On appeal, Rosenthal suggests the court erroneously considered the above statements because the signature pages were not submitted to authenticate the statements. By not raising this objection prior to the court's ruling, Rosenthal is foreclosed from asserting it on appeal. (Haskell v. Carli (1987) 195 Cal.App.3d 124, 129-130.) Rosenthal cites Dugar v. Happy Tiger Records,

2. Denial of Rosenthal's Motion

In a motion for summary adjudication of issues Rosenthal suggested that, as a matter of law, the Heinz fee was not assigned to Rosenthal & Rhoads in the July 1973 agreement. Contrary to his argument, the court correctly denied this motion.

First, although a personal services contract cannot be assigned if services are still being rendered (Goodley v. Wank & Wank, Inc. (1976) 62 Cal.App. 3d 389, 396), such contract is assignable if the services have

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Inc. (1974) 41 Cal.App.3d 811 to suggest no such waiver occurs in summary judgment proceedings. However, subsequent to Dugar, Code of Civil Procedure section 437c, subdivision (b) was added. (Haskell v. Carli, supra, 195 Cal.App.3d at pp. 129-130.) This provision specifically states that "Evidentiary objections not made at the hearing shall be deemed waived." Additionally, Rosenthal has not brought forth any authority for his proposition that in considering a motion for summary adjudication of issues the trial court cannot consider statements made under penalty of perjury in other proceedings. Further, Rosenthal has not demonstrated that such statements have to be given "against one's interest" when made to be considered.

been "practically rendered and accomplished." (Taylor v. Black Diamond Coal M. Co. (1890) 86 Cal. 589, 590.) Here, Rosenthal did not show that substantial services were yet to be performed. Rosenthal suggests the fee was not vested because the contingencies had not been met. However, the contingencies were not within the control of the heirs, and Rosenthal did not show that because the contingencies might occur substantial, additional services were yet to be performed. Thus, the Heinz fee was a debt which could be assigned to others.

Second, Rosenthal points to two provisions in the July 1973 agreement. One states that the law partnership of Rosenthal, Cook & Green assigned all of its rights to Rosenthal & Rhoads "free and clear" [4]/ of

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[4]/ The provisions read in part: "At all times herein relevant, the following was and is true: Par. (b) Subsequently thereto, the law partnership denominated ROSENTHAL, COOK and GREEN ceased doing business and ROSENTHAL thereafter sold and assigned all his right, title and interest in and to the HEINZ CONTINGENCY FEE to a California professional law corporation known as Rosenthal & Rhoads, a

claims by Rosenthal. The other specifies that the rights to be transferred were those amounts "now due." Rosenthal then argues that the Heinz fee was not transferred because it was not mentioned in the agreement and because both Rhoads and Rosenthal denied transferring the fee to the corporation. In opposing the motion, numerous documents authored or drafted by Rosenthal, as well as his statements, indicated that it was the intent of the agreement to transfer the Heinz fee. Since the contract terms could reasonably include those attorney fees earned but not then payable, it was appropriate for the court to conclude that the contract was not unambiguous on its face and that extrinsic evidence such as that contained in the opposition was required to interpret the document. (Loree v. Robert F. Driver Co. (1978) 87 Cal.App.3d

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Professional Corporation, which at all times thereafter was the sole and exclusive owner thereof free and clear of any claims of ROSENTHAL."

1032, 1039-1040) [5]/

SUBPOENA DUCES TECUM

Prior to trial, Rosenthal served two subpoena duces tecum upon Conrad which requested, among other items, all financial records for Conrad's law corporation from 1975 to 1988. Contrary to Rosenthal's suggestion, the trial court did not abuse its discretion (Grannis v. Board of Medical Examines (1971) 19 Cal.App.3d 551, 566; Embassy Realty v. Southwest Prod. Co. (1954) 126 Cal.App. 725, 732) in quashing these subpoenas and no reversible error occurred. [6]/ At the time the

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[5]/ Conrad's complaint included the assertion that "[i]n or about June, 1983, [the date Vira Heinz died] the HEINZ CONTINGENCY FEE became due and payable." This statement does not contradict the conclusion that the contract terms included the Heinz fee. Rather, in context these terms could reasonably be understood to suggest that the monies could be collected in 1983.

[6]/ The trial court ordered some of the requested information be produced. The court ordered that Conrad produce the schedule of his personal assets utilized in his dissolution proceedings and records evidencing the payments made to purchase the corporation.

motion was ruled upon, Rosenthal admitted he had already received and examined the records requested. This information was presented through the testimony of a witness on behalf of Rosenthal and through Exhibits 130 and 176. Since the information was obtained by Rosenthal and presented to the jury, there can be no prejudice to him.

ROSENTHAL'S MOTION IN LIMINE

Rosenthal brought a motion in limine requesting the other parties be prevented from discussing numerous items. Contrary to his contention, the trial court did not abuse its discretion (People v. Green (1980) 27 Cal.3d 1, 19) in admitting as relevant certain items. (Evid. Code, Sect. 210, 350, 351.)

The trial court allowed information relating to Rosenthal's disciplinary proceedings, but did not permit the parties to introduce the fact that Rosenthal had been disbarred. During the disciplinary proceedings Rosenthal signed documents under

penalty of perjury denying he owned any assets. These documents contradicted Rosenthal's claim to the Heinz fee and thus were relevant with regard to Rosenthal's credibility. Additionally, the jury was entitled to know they were submitted in disciplinary proceedings, the context in which these documents were prepared.

Rosenthal's contention that the court erred by not directing that Doris Day be addressed by her married name, Melcher, is not persuasive. This evidence was relevant and admissible. The exact identity of the other party to the suit was relevant to Rosenthal's claim that Conrad caused the loss of Rosenthal's professional reputation. The enormous size of the judgment against Rosenthal explained why the various law firms were formed and sold and the relationship of the different attorneys to one another. To understand the chain of events it was important that the motivation of the various

people involved and the context in which they were acting be explained.

Lastly, Rosenthal claims the court erred is not precluding reference to specific acts of his misconduct. Rosenthal was unable in his pleadings or at oral argument on his motion to articulate exactly which acts he was asking be excluded. Obviously, as the trial court concluded, this request was ambiguous.

SUBSTANTIAL EVIDENCE/JNOV

Rosenthal contends the record lacks substantial evidence and his motion for judgment notwithstanding the verdict should have been granted. These contentions are not persuasive.

On appeal, our review "'begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.'" (Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881, emphasis in original.) We do not reweigh the evidence but

examine the entire record in the light most favorable to the judgment to determine if sufficient evidence supports the trier of fact's conclusions. (People v. Wright (1985) 39 Cal.3d 576, 592.) The substantial evidence test is applied to test the propriety of a judgment notwithstanding the verdict. (Hasson v. Ford Motor Co. (1977) 19 Cal.3d 530, 546.)

1. The Fee.

Overwhelming evidence indicated that the three partners in the firm Rosenthal, Cook & Green became entitled to share designated percentages in a fee earned by rendering services to the three Heinz siblings, that in 1973 Rosenthal assigned his share of the proceeds to a law corporation, and that Conrad eventually acquired the rights to Rosenthal's share. Thus, when the fee was payable, it belonged to Cook, Green and Conrad.

Both documentary evidence and testimony at trial amply supported the jury's conclusions. The fee agreement with the

Heinzes specified that the firm of Rosenthal, Cook & Green was entitled to a contingent fee. The settlement documents in the Heinz matter showed that the three siblings, and thus the firm, would only receive the benefits of the settlement when the Heinz stepmother, Vira Heinz, died. The other contingencies [7]/ were also demonstrated by the evidence.

The testimony of Cook and Conrad, as well as an amendment to the Rosenthal, Cook & Green partnership papers, demonstrated how the fee was to be distributed. Green and Cook both testified as to the breakup of the Rosenthal, Cook & Green firm. Green also testified that he continued to work with Rosenthal until 1968.

Thereafter, records and numerous witnesses explained the massive litigation between Rosenthal and his ex-client Doris Day

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[7]/ The fee would be paid only if certain unborn heirs did not make a claim on the estate and if the Attorney General in Pennsylvania did not assert that a charitable trust had rights to the stock.

and that this litigation consumed an inordinate amount of time for whichever attorney handled the thirteen consolidated matters. In July 1973, Rosenthal entered into an agreement with attorney Rhoads in which assets were placed into a law corporation called Rosenthal & Rhoads. The document described the assets as "[a]ll of clients' [Rosenthal, Cook & Green] rights to amounts now due from others for the previous rendition of services. . . ." The written agreement showed that Rhoads owned all of the shares of the stock. Additionally, the agreement obligated Rhoads to represent Rosenthal in the Doris Day litigation, obligated Rhoads to provide Rosenthal with a law office, including paying for overhead and the library, and permitted Rhoads to pay for additional expenses Rosenthal might incur. The agreement obligated Rosenthal to work for the corporation. The overhead costs were never less than $60,000 per year.

Numerous witnesses testified the Heinz fee was an asset of the corporation as delineated in the 1973 agreement. Cook testified that all of the work for the Heinz fee was completed prior to the breakup of the original firm. Thus, the Heinz fee was owned by the original three partners to be paid when Vira died and if the other contingencies did not occur. By the 1973 agreement, Rosenthal transferred his share of the Heinz fee as it was "now due," but simply not payable. [8]/

Thereafter, the assets of the law corporation, including the Heinz fee, were sold to Seltzer, who eventually sold the

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[8]/ This conclusion is further supported by the statements in numerous documents signed by Rosenthal under penalty of perjury, in a letter he wrote to the Justices of the California Supreme Court and in documents he prepared or reviewed denying he owned any assets and indicating the fee was an asset of the law corporation. (See Exhibit No. 44 [list of Rosenthal and Seltzer assets]; Exhibit No. 55 [purchase agreement]; Exhibit No. 59 [extension agreement]; Exhibit Nos. 69 and 98 [probate creditors claim]; Exhibit Nos. 165, 168, 171 and 174 [State Bar documents]; Exhibit No. 196 [letter].)

assets to Conrad. Not only do the statements of Conrad and Seltzer support the conclusion that the fee was still part of the assets transferred, but Rosenthal's own oral and documentary statements supported this conclusion.

In arguing to the contrary, Rosenthal asks us to believe his testimony and to disregard hundreds of documents and thousands of pages of transcript which all support the jury's conclusions that Conrad and Green were entitled to the undistributed part of the Heinz fee. (Rosenthal did not object to Cook receiving his share.) It is obviously inappropriate for us to reweigh the evidence and to reject this overwhelming evidence.

Rosenthal also suggests the facts, as relied upon by Conrad and Green, were not believable. What is not believable is that Rosenthal is making these arguments. It is very believable Rosenthal would have assisted in the sale of the law corporation to Conrad.

Rosenthal received many benefits from the 1973 agreement; besides others, the owner of the law corporation paid the overhead on Rosenthal's office and maintained a law library. Even if Seltzer had offered to sell the corporation to Rosenthal for a small sum, Rosenthal benefited by others paying for his expenses. Further, Seltzer's testimony on this transfer was not incredible. Certain contingencies had to occur before the Heinz fee became payable. After the Doris Day matters were concluded, it was easy to see why an attorney would no longer want to be associated with Rosenthal. Seltzer's decision to sell the corporation, including the Heinz fee is thus very understandable.

Testimony indicated that after one of the Heinz siblings (Dorothy) died, Rosenthal helped draft a creditor's claim on behalf of Conrad. Rosenthal filed this claim in the Florida probate proceedings. It is not incredible Rosenthal would have flown to

Florida to file this document on behalf of Conrad. Rosenthal worked with Conrad; there is nothing unusual about Rosenthal filing a document to protect an asset owned by Conrad.

The disparity between the purchase price and the value of the corporation did not make it incredible that the Heinz fee would have been transferred to the law corporation. [9]/ The owner of the law corporation had many obligations, including maintaining an office for Rosenthal, a $60,000 per year expenditure. Since the payment of the Heinz fee was uncertain and the cost of maintaining the law corporation high, the cost of the stock of the law firm was not so extremely low, as compared to the fee, that Conrad's evidence becomes incredible. [10]/

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[9]/ We do not take the time to demonstrate, item by item, how Rosenthal's figures are erroneous. We simply note that he disregards much of the record in making his argument.

[10]/ We also reject Rosenthal's assertions that Conrad did not give consideration when Conrad bought the law

Rosenthal also argues that the evidence does not support the jury's determination that Green was entitled to his share of the Heinz fee because Green surrendered his rights to the fee. In making this argument, Rosenthal again asks that we

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corporation and the contract was unconscionable. Conrad paid $30,000 for the stock and obligated himself to other contractual responsibilities. Even though representing Rosenthal in the Doris Day cases may have been a major component of the 1973 agreement, it is illogical to conclude that other significant obligations did not remain. Rosenthal was justly compensated.

Rosenthal also suggests the terms of Conrad's marital settlement agreement (Exhibit 250) conclusively proved the fee was not an asset of the corporation. The agreement specifically stated that the Heinz fee was an asset of the corporation and that Conrad was to share it with his wife. Rosenthal's argument based upon what was delineated as "funds available" is convoluted and contradictory to other parts of the agreement.

We also reject Rosenthal's suggestion that by allowing Conrad to keep the Heinz fee Conrad will be unjustly enriched. When Conrad purchased the law corporation he also assumed the obligations of the 1973 agreement. Additionally, we reject Rosenthal's claim that the fee was simply held in trust for him. The jury rejected his claim; overwhelming evidence proved Conrad owned the fee.

reweigh the evidence and accept his version of the facts and conclude, contrary to the findings, that Green acted inappropriately. The jury specifically rejected Rosenthal's claim that he was entitled to damages because of purported breaches by Green. The facts did not demonstrate Green breached his fiduciary obligations to Rosenthal. Additionally, we refuse to accept Rosenthal's versions of the facts that Green was only entitled to a portion of the fee if Green continued to practice with Rosenthal. The fee was earned when the Heinz matter was settled. Rosenthal, Cook and Green agreed as to how the fee would be distributed in 1964 and 1965 in two amendments to the partnership agreement. Without affecting his rights to the Heinz fee, Green was free to leave his relationship with Rosenthal.

2. **Compensatory Damages/Punitive Damages**

The jury awarded Conrad $112,360 and

Green $21,174 in compensatory damages. Contrary to Rosenthal's suggestion, these sums were supported by the evidence. Conrad testified on January 17, 1990 that in defending Rosenthal's claims he had already lost thousands of dollars of income. Conrad stated that as of that date he spent 250 hours away from his office fighting Rosenthal's claims and that his hourly fees ranged from $125 to $175 per hour. Since the matter did not go to the jury until February 15, 1990, almost a month later, Conrad would have incurred additional losses in litigating the matter. Additional testimony was admitted which demonstrated the hourly rates charged by other attorneys. Green, an accountant as well as an attorney, by necessity also would have lost earnings in fighting Rosenthal's unsubstantiated claims. Further, there was testimony that had Conrad and Green promptly obtained the over $2 million Heinz fee they would have been able to earn at least 1

percent more per year. Thus, the jury had before it sufficient evidence to determine the losses incurred by both Conrad and Green due to Rosenthal's actions.

Conrad was also awarded $150,000 in punitive damages and Green was awarded $300,000 in punitive damages. During the pendency of this matter, the Supreme Court decided Adams v. Murakami (1991) 54 Cal.3d 105, in which the court held that an award of punitive damages must be reasonably related to the egregious nature of the conduct, the amount of compensatory damages and "cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial condition." (Id. at p. 109.) Since Rosenthal suggested the punitive damage awards were not supported by the record and specifically argued there was no evidence of his financial worth in the record, we invited the parties to submit additional briefs on this issue. Assuming Adams is to be

applied to cases pending before the court of appeal [11]/ at the time it was filed, Rosenthal's argument lacks merit.

First, contrary to Rosenthal's suggestion, and as noted by Conrad's attorney below, there was evidence of Rosenthal's wealth (assets and liabilities) in the record. Information regarding his liabilities showed that Doris Day had received a judgment against Rosenthal for over $20 million, that Rosenthal had no assets (as he stated to the State Bar), that he could not pay a firm to handle the Doris Day litigation or the State Bar proceedings and that his liabilities exceeded his assets in an amount of excess of $23 million. However, information regarding his assets showed he had obtained $700,000 from the Heinzes as well as a large payment from an

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[11]/ Neither party addressed the retroactive effect of Adams. We assume, but do not decide, that it is to be applied retroactively. (Douglas v. Ostermeier (1991) 1 Cal.App.4th 729, 734 [Adams is not to be given only prospective effect].)

insurance carrier.[12/]

Additionally, Rosenthal's entire argument at trial was he had hidden assets from his creditors, including his purported rights to the Heinz fee. This argument is repeated on appeal. Given this position, Rosenthal is foreclosed in suggesting Conrad and Green did not present evidence of his wealth at the time of trial. Rosenthal claimed he was impoverished, or at least that he had no assets in his name. He cannot expect to present one line of facts when it pleases him, but then hide behind those facts when it is not to his benefit.

As to the other items necessary to

[12/] The irony, of course, was that the information developed on this issue was contradictory, presented under or against Rosenthal's suggestion he was hiding assets from creditors, and surrounded by the obvious conclusion he fabricated evidence when he believed it was appropriate to do so. (This later conclusion is clear from the record in which it was shown that over the years Rosenthal's accountants prepared numerous, contradictory versions of his earnings and from Rosenthal's statements that on some occasions it was appropriate to lie under oath.)

support the jury's award of punitive damages, we need say very little. (Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910, 928.) Rosenthal's actions were egregious. His greed delayed Conrad and Green possession of their property. Without a thread of evidence, and in contrast to overwhelming testimony and documentary evidence, Rosenthal forced Conrad and Green through the judicial system and to trial. Further, the ratio of actual damages to punitive damages indicated the jury carefully considered its responsibilities, was not aroused by passion or prejudice as the award reasonably related to the amount of compensatory damages. In awarding Green a larger sum of punitive damages, the jury showed it carefully considered the matter and found Rosenthal's actions particularly repugnant with regard to Green. Green's rights to the fee vested when the will contest was settled. Green, Rosenthal and Cook determined how the fee was to be distributed.

Unlike the claim made against Conrad, Rosenthal did not suggest Green held the fee in trust for Rosenthal; in fact, it was difficult to ascertain the basis for Rosenthal's suggestion Green was not entitled to his percentage of the fee. Thus, there was absolutely no support for Rosenthal's argument that Rosenthal had a right to Green's share of the fee. Rosenthal's arguments against Green were totally specious. (See Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal.App.3d 381, Appendix, pp. 393-396; Douglas v. Ostermeier, supra, 1 Cal.App. 4th at pp. 750-751 fn. 4.) Thus, the jury did not abuse its discretion in awarding the punitive damages.

INSTRUCTIONS

1. **Rosenthal's Proposed Instruction No. 107**

Rosenthal suggested that the cases of Tinney v. Tinney (1963) 211 Cal.App.2d 548, Martin v. Kehl (1983) 145 Cal.App. 3d 228 and

Hill v. Younkin (1969) 274 Cal.App.2d 880 supported the utilization of a special instruction on unclean hands.[13]/ However, these cases do not hold, as the instruction stated, that one who attempts to defraud

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[13]/ The following instruction was requested: "A person who attempts to place his property beyond the reach of his creditors is entitled to recover his property back from the one to whom the property was transferred if (1) there was no damage or harm to any creditor, or (2) the person or company holding the property was not damaged or prejudiced or (3) the person or company holding the property would be unjustly enriched if the property was not returned to its rightful owner." The trial court properly rejected this instruction as it is not an accurate statement of the law. Hill, supra at pages 882-884 holds a trial court may consider whether or not creditors were actually defrauded and whether or not unjust enrichment results when considering if the doctrine of unclean hands prevents a party from claiming rights to property held by another. Tinney, supra at page 555 and Martin, supra at pages 239 and 240, footnote 1 hold that unclean hands applies only when the misconduct is connected to the injury of the other and a denial of relief would be inequitable. Rosenthal suggests he was not guilty of unclean hands, yet he presents the contradictory argument that the court erred by not instructing on unclean hands. Since the jury determined that Conrad and Green were entitled to the remaining portion of the Heinz fee and that Conrad did not hold any assets in trust for Rosenthal, this argument is irrelevant.

creditors by transferring property is entitled to have the property back.

2. Rosenthal's Proposed Instruction Nos. 54 and 62

Proposed Instruction No. 54 stated that a constructive trust exists when acquisition of the property was wrongful and that keeping of the property would result in unjust enrichment. Instruction No. 62 discussed an involuntary trust. [14]/

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[14]/ Instruction No. 54 read: "Constructive Trust Par. A constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled. The wrongful act giving rise to a constructive trust need not amount to fraud or intentional misrepresentation. All that must be shown is that the acquisition of the property was wrongful and that the keeping of the property by the person would constitute unjust enrichment. Par. If you find that CONRAD/CONRAD CORP acquired the assets of the professional corporation and/or the Heinz fee and other legal fees wrongfully, you may impose a constructive trust on that property/fees for the benefit of ROSENTHAL."

Instruction No. 62 read: "Creation of Involuntary Trust-Mistake of Wrongful Act. 'One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or

It was proper to exclude these instructions because they were incomplete statements of the law. (Civ. Code, Sects. 2223, 2224; Weiss v. Marcus (1975) 51 Cal.App.3d 590, 600.) Further, even if there was error, it was harmless. The jury made specific findings that neither Conrad nor the Conrad Law Corporation were holding any assets in trust for Rosenthal.[15]/ This was a major focus of Rosenthal's case. Thus, it is clear the jury rejected Rosenthal's entire explanation of the events.

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she has some other better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.' Para. If you find that CONRAD/CONRAD CORP acquired any property of ROSENTHAL's by breach of trust or other wrongful act, then you must find that CONRAD/CONRAD CORP is the involuntary trustee of the thing gained, for the benefit of ROSENTHAL."

[15]/ The pertinent special findings read: "4. Is the Conrad [Law] Corp. or Robert Nolan Conrad. . . holding any transferred assets in trust for Rosenthal? Yes___ No_X_" "8. Was an oral fee-sharing agreement (as testified to by Rosenthal) entered into between Rosenthal and Conrad [Law] Corp. or Conrad? NO \/"

3. Rosenthal's Proposed Instructions Nos. 40, 41, 108

Citing Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal.App.3d 200 and Leff v. Gunter (1983) 33 Cal.3d 508, Rosenthal proposed Instructions Nos. 40, 41 and 108. These instructions stated that partners may not take any action with respect to unfinished partnership business and that if such action was taken by Green, Green's claim would be defeated. Additionally, the instructions asserted that Green negotiated with Conrad for his own personal gain and thus Green breached his fiduciary obligations.[16]/

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[16]/ Instruction No. 40 read: "A partner owes another partner a duty not to take any action with respect to unfinished partnership business which leads to purely personal gain. A partner who violates this duty is liable to the other for this breach. Para. Therefore, if you find that GREEN agreed with CONRAD, without the knowledge or consent of ROSENTHAL, to collect the Heinz Intestacy Fee and/or the Kerr-McGee/Arco payments to the exclusion of ROSENTHAL, you may find that act or acts to be a breach of GREEN's duty to ROSENTHAL and a complete bar to GREEN's claim to the HEINZ Intestacy Fee."

Instruction Nos. 40 and 41 were irrelevant as this case did not involve unfinished partnership business. The services had already been rendered to earn the Heinz fee. Instruction No. 108 was confusing and an incorrect statement of the law because it suggested that when funds were placed in trust there was a violation of Green's fiduciary obligations. However, Green's obligations to

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Proposed Instruction No. 41 read: "A partner owes another partner a duty not to take any action with respect to unfinished partnership business which leads to purely personal gain. A partner who violates this duty is liable to the other for this breach. Para. Therefore, if you find that GREEN agreed to cooperate with his and ROSENTHAL's adversaries in the Samet cases without the knowledge or consent of ROSENTHAL, you may find this act to be a breach of GREEN's duty to ROSENTHAL and a complete bar to GREEN's claim to the Heinz Intestacy Fee."

Proposed Instruction No. 108 read: "You are instructed that when a partner, such as HARLAND N. GREEN, negotiates and contracts with a third party, here CONRAD CORP., for the partner's own personal benefit, concerning business of the partnership or the former partnership, that partner is in violation of his fiduciary duty to other partner(s) or former partner(s) and is liable for breach of fiduciary duty to such partner(s) or former partner(s)."

Rosenthal had ended. Additionally, the authorities cited by Rosenthal are inapplicable. (Rosenfeld, Meyer & Susman v. Cohen, supra, 146 Cal.App.3d 200 [partners may not dissolve partnership in bad faith and thereafter continue to perform services for clients of the partnership]; Leff v. Gunter, supra 33 Cal.3d 508 [breach of fiduciary duty to exploit partnership information and to take partnership business].)

4. Green's Special Instructions

Contrary to Rosenthal's suggestion, the trial court correctly instructed the jury with Green's Special Instructions Nos. 5, 6 and 7. No. 5 paraphrases a portion of Corporations Code section 15018, subdivision (h): "No act may be done which is contrary to the partnership agreement unless there is the consent of all the parties." Part of the preamble to section 15018 ("subject to any agreement between [the partners]") is not vital to the giving of the instruction. This

idea is inherent in the instruction as given. Instruction No. 6, a verbatim portion of Corporations Code section 15025 (with insignificant punctuation changes), was not erroneous nor was it misleading: "A partner is co-owner, with the other partners, of specific partnership property." Instruction No. 7, a paraphrased portion of Corporations Code section 15025, was not erroneous nor misleading. "The rights of all the partners in specific partnership property may be assigned to the individual partners." Further, contrary to Rosenthal's suggestion, because the work to be performed on the fee agreement was substantially performed, the entitlement to the fee was assignable and would be considered property.

SANCTIONS ON APPEAL

Both Conrad and Green have requested sanctions on appeal. Rosenthal was on notice of this request and submitted briefing on the issue. Additionally, the matter was addressed

at oral argument.

Rosenthal, a man who used to be a licensed attorney, and his counsel continue to use the system to delay the inevitable. We, as well as counsel for Conrad and Green, reviewed thousands of pages of testimony, an enormous clerk's transcript, hundreds of documents, and voluminous pleadings to combat groundless arguments.

Even if a few of Rosenthal's arguments have threads which could be construed as "arguable" the bulk of his brief rehashes losing arguments, fails to mention important, contrary evidence, and presents issues which no reasonable attorney would suggest. The frivolous aspects are significant and material. Rosenthal's arguments were flatly rejected below, as we have done on appeal. Both Rosenthal and his attorneys were fully aware of the legal arguments and were fully aware of the burden to the court and to the parties by reasserting

them on appeal. There can be no logical reason for these actions except to delay and harass Conrad and Green, who have waited years to receive the Heinz fee. Rosenthal has been sanctioned by this court in at least one other matter and was put on notice that we would be considering sanctions here. Thus, he and his counsel were fully aware of the standards we utilize in determining if sanctions are appropriate. (Cal. Rules of Court, rule 26; Code Civ. Proc., Sec. 907; In re Marriage of Flaherty (1982) 31 Cal.3d 637, 645-651; Young v. Rosenthal (1989) 212 Cal.App.3d 96, 130-137; Maple Properties v. Harris (1984) 158 Cal.App.3d 997, 1010; M. E. Gray Co. v. Gray (1985) 163 Cal.App.3d 1025, 1040, fn. 15.) By fostering unsupportable arguments Rosenthal's attorney has breached his obligations as it is clear that this appeal was taken solely to harass and delay. (Bus. And Prof. Code, Sec. 6068, subd. (c); Rule 3-200, Rules Prof. Conduct.)

DISPOSITION

Jerome B. Rosenthal and his attorneys Arnold G. Regardie and Edwin J. Klein, Jr. jointly and severally shall pay the sum of $23,000 to Robert Nolan Conrad, a law corporation within 10 days after this order becomes final. Jerome B. Rosenthal and his attorneys Arnold G. Regardie and Edwin J. Klein, Jr. jointly and severally shall pay the sum of $11,000 to Harlan N. Green, a Professional Corporation within 10 days after this order becomes final. (We have reason to believe that Edwin J. Klein, Jr. may be deceased. The sanction awards are to be considered personal debt against Klein and not debts of his estate or of his law practice.)

The clerk of this court is directed to send a certified copy of this opinion to the Chief Trail Counsel of the Los Angeles office of the State Bar of California. (Bus. & Prof. Code, Sec. 6086.7, subd. (c).)

The judgment is affirmed.

NOT TO BE PUBLISHED

ASHBY, J.

We concur:

TURNER, P.J.

GRIGNON, J.

APPENDIX

C. Judgment of Court of Appeals re Sanctions, filed February 6, 1992

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIF.

SECOND APPELLATE DISTRICT

DIVISION FIVE

JEROME B. ROSENTHAL, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent, ROBERT NOLAN CONRAD, Real Party In Interest.	2d Civil No. B057140 (Sup.Ct. No. C545108) Court of Appeal Second Dist. Filed Feb. 06 1992

JOSEPH A. LANE Clerk

_____

Deputy Clerk

Application for Costs and Sanctions for Filing Frivolous Petition of Writ of Mandate and for Filing Frivolous Emergency Application for Stay and Petition for Review

to Supreme Court. Application granted.

Arnold G. Regardie and Edwin J. Klein, Jr. for Petitioner.

Fierstein & Sturman, Robert S. Mann, Bess Blank and Gregg A. Martin for Real Party in Interest.

In a petition for writ of mandate, prohibition or other appropriate relief, Jerome Rosentahl (Rosenthal) asserted the trial court was in error in holding him in contempt for failing to answer questions at a judgment debtor proceeding. The judgment debtor proceedings were conducted by real party in interest Robert Nolan Conrad, a law corporation, (Conrad) to collect a civil damage award. [1/] We summarily denied the petition and thereafter Rosenthal filed an

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[1/] For simplicity, we address Conrad and his law corporation as Conrad.

emergency application for immediate stay with the California Supreme Court. The Supreme Court denied Rosenthal's request for relief "without prejudice to a renewed application by Real Parties to the Court of Appeal. . .for their costs and for sanctions based on the Petition for Writ of Mandate . . . ."

Pursuant to the Supreme Court's referral order, Conrad has filed an application for costs and sanctions. In arguing whether Rosenthal's actions were frivolous, the only legal argument addressed by the parties is whether or not Rosenthal properly asserted his fifth amendment privilege in the judgment debtor proceedings.

After a duly noticed hearing, we determine Rosenthal's petition for writ and the emergency application were frivolous and were brought solely for delay; we award sanctions in the sum of $22,000 against Rosenthal and Edwin J. Klein, Jr., the attorney who appeared at the judgment

proceedings and who signed both the petition for writs and the emergency applications.

FACTS

Conrad and Rosenthal are both attorneys. Conrad (and his coplaintiff attorney Green) and Rosenthal claimed ownership of a multimillion dollar attorney fee being held in trust. [2]/ After a lengthy jury trial, it was determined Rosenthal was not entitled to any portion of the fee. Additionally, the jury awarded approximately $260,000 to Conrad in compensatory and punitive damages.

In an effort to collect the monetary award, Conrad subpoenaed Rosenthal to appear at a judgment debtor proceeding. A subpoena duces tecum was also served requiring Rosenthal to bring records to the hearing. Rosenthal failed to bring any records and

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[2]/ Rosenthal is not presently licensed, having lost his right to be an active member of the State Bar after disciplinary hearings. At the time Rosenthal asserted he owned the fee he was a licensed attorney.

refused to answer even the simplest question, such as where he resided., In asserting he did not have to respond to the inquiries, Rosenthal and his counsel stated Rosenthal was hiding assets from creditors and stated that to answer any question might tend to incriminate Rosenthal and would violate Rosenthal's fifth amendment privileges. When this was explained to the commissioner, Rosenthal was ordered to answer and was ordered to appear on another day. At that hearing, neither Rosenthal nor his counsel specifically addressed the issues. Thereafter, documents were filed in support of Rosenthal's position that he could assert the fifth amendment privilege. The commissioner considered Rosenthal's papers and detemined the matter was controlled by Troy v. Superior Court (1986) 186 Cal.App. 3d 1006. Thereafter, Rosenthal again refused to answer on the grounds that it might tend to incriminate him; neither Rosenthal nor his

attorney would give a reason for the failure to produce documents. Because Rosenthal's answers were convoluted, the commissioner also ordered Rosenthal to state specifically if he was objecting to a question based upon a fifth amendment privilege. In subsequently posed questions, Rosenthal asserted the privilege, refused to identify documents and refused to answer questions.

Conrad brought an order to show cause re contempt for disobeying the court's orders to answer the questions. In Rosenthal's opposition, among other suggestions, he contended the proceedings were only to determine if "the claim of the Fifth Amendment Privilege will be available to him." Rosenthal was held in contempt. He thereafter brought a petition for a writ seeking relief. This division denied that petition. Rosenthal then filed with the Supreme Court an emergency habeas corpus/certiorari petition for review of contempt order; request for immediate stay

of commitment order. The Supreme Court denied Rosenthal's request without prejudice to Conrad filing with the Court of Appeal an application for costs and sanctions.

DISCUSSION

Pursuant to the Supreme Court's order, Conrad has filed this application asking for costs and sanctions. Thus, we are called upon to determine if filing the writ and filing the emergency petition with the Supreme Court were frivolous or taken solely for delay. (Code Civ. Proc., Sections 907; Cal. Rules of Court, rule 26(a); Bus. & Prof. Code, Section 6068, subd. (d); In re Marriage of Flaherty (1982) 31 Cal.3d 637, 646; Gottlieb v. Superior Court (1991) 232 Cal.App.3d 804, 807, 815; Coast Sav. & Loan Assn. v. Black (1986) 187 Cal.App.3d 1494, 1501.)

In determining if sanctions are appropriate our responsibility is to assure that attorneys are not prevented from

vigorously representing their clients while preventing actions which are without merit and simply taken for purposes of delay, to harass opposing parties or to waste judicial resources. (In re Marriage of Flaherty, supra, 31 Cal.3d at pp. 647-651.) To make this determination, we look not only at the motives of the parties, but whether their actions are totally without merit. (Id.)

We first discuss the merits of Rosenthal's petitions. In the petitions Rosenthal suggested he was not in contempt because he rightfully invoked his fifth amendment privilege and thus did not have to answer the questions at the judgment debtor proceeding.

The lower court correctly noted that Troy v. Superior Court, supra, 186 Cal.App.3d 1006 controls the matter. In Troy, a case of this division, we discuss the fifth amendment privilege as it relates to judgment debtor proceedings. While the privilege is

applicable in this setting, it is properly utilized when "the fear [of incrimination is] reasonable in light of the witness's specific circumstances, the content of the questions, and the setting in which the questions are asked. [Citation.] In other words, the privilege protects only against 'real dangers,' and not 'remote and speculative possibilities.' [Citation.] [Para.] . . . If the court, in the exercise of its discretion, determines that no threat of self-incrimination is evident, then the burden of showing the danger of self-incrimination shifts to the individual asserting the privilege. [Citation.]" (Id. at p 1011.) Debtors cannot use the privilege to evade the purposes of the debtor proceedings. Fear of being prosecuted is not sufficient. (Id. at p. 1012.) The fifth amendment privilege cannot be asserted simply because the debtor claims that answers to routine questions about personal assets can be a "link in the chain"

and theoretically enable prosecuting agencies to bring charges. (Id. at pp. 1012-1013.) There must be real, not imagined nor conjured hazards of incrimination in light of the circumstances. (Id. at pp. 1011, 1012.) While debtors do not have to conclusively establish that answers will subject them to prosecution (Zonver v. Superior Court (1969) 270 Cal.App.2d 613, 621; Cohen v. Superior Court (1959) 173 Cal.App.2d 61, 68), more than mere conjecture is required. A reasonable possibility of incrimination must exist. Otherwise, all debtors could escape judgment debtor proceedings simply by suggesting there might be incrimination potentials.

Here, like in Troy, there was no showing that a criminal prosecution was pending, that an investigation was in process or that there was any real danger of incrimination. Rosenthal's refusal to answer was a blanket invocation of the privilege without regard to the substance of each

question. He did not connect his refusal to answer to possibilities of incrimination. Additionally, Rosenthal never presented any evidence nor did his counsel (attorney Klein) ever present any argument to suggest Rosenthal's situation was different than thousands of debtors who are being pursued by creditors. Simply arguing that he could be apprehended for violating Penal Code sections 154 and 155 (judgment debtor fraudulently concealing assets) does not meet Rosenthal's burden. His suggestion that this admission could lead to criminal charges is speculative. Rosenthal could not reasonably believe such charges would be filed.

Troy was discussed by the court; both Rosenthal (who at one time was a licensed attorney) and his counsel were aware of its holding. [3]/ Thus, there can be no suggestion

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[3]/ Contrary to Rosenthal's suggestion Troy does not conflict with the federal law on this issue. (Hoffman v. United States (1951) 341 U.S. 479; Capitol Products Corporatino v. Hernon (8th Cir. 1972) 457 F.2d 541; United

they were unaware of the law. Rosenthal's argument, promoted by attorney Klein, was frivolous and totally without merit. Neither Rosenthal nor attorney Klein had a reasonable belief there would be danger if questions were answered. The inquiries made by Conrad were typical of those creditors ask in judgment debtor proceedings. The responses were not credible.

We also examine the conduct of Rosenthal and his counsel as it is relevant with regard to sanctions. We have examined the transcripts of the judgment debtor proceedings; it is obvious Rosenthal and attorney Klein were stone-walling. They constantly wasted judicial time and the time of Conrad's attorney, resulting in unnecessary expenditures. No information was divulged by

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States v. Jones (10th Cir. 1983) 703 F.2d 473; Martin-Trigona v. Gouletas (7th Cir. 1980) 634 F.2d 354; Baker v. Limber (9th Cir. 1981) 647 F.2d 912; Brunswick Corp. v. Doff (9th Cir. 1981) 638 F.2d 108; Estate of Fisher v. C.I.R. (2nd Cir. 1990) 905 F.2d 645.)

Rosenthal, and Conrad's attorney was forced to take unnecessary measures in efforts to make a record of what occurred. In refusing to answer questions, an objection was not simply stated. Rather, Rosenthal and attorney Klein frequently refused to state a straight objection. They tried to confuse the issues, to change the direction of the inquiry and generally harassed Conrad's attempts at proceeding in an orderly manner. They exhibited a stubborn resistance and a wilfull disregard for the proceedings. [4]/

After the initial ruling, Rosenthal and his attorney continued to waste judicial resources. They filed a petition with this court and thereafter with the Supreme Court, posing the same, unsubstantiated legal arguments. By this conduct, Conrad was

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[4]/ While we cannot award sanctions for the abusive actions in the court below (Coast Sav. & Loan Assn. v. Black, supra, 187 Cal.App.3d at p. 1500), in order to determine the frivolous nature of the writ we must examine the context in which it was brought.

further harassed, additional expenditures were incurred, and the matter was further delayed.

Attorneys are a necessary and vital component of the judicial system. Without representation, many clients would lose valuable rights. However, it is inappropriate for them to foster unsupportable positions, ignore controlling authority and manipulate the system to cause delay. Here, by pursuing this course of conduct Rosenthal's counsel participated in abusing the process and Rosenthal's counsel violated his obligations as an attorney. [5]/

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[5]/ The petition for writ as well as the emergency application indicated they were being filed by "Arnold G. Regardie, Edwin J. Klein, Jr., attorneys for Jerome B. Rosenthal." At oral argument attorney Regardie indicated that even though his name appeared on the pleadings, he was not personally involved. We invited, but did not require, attorney Regardie to submit a declaration detailing his involvement in the matter. According to his declaration, signed under penalty of perjury, attorney Regardie stated it was decided that attorney Klein would handle the judgment debtor proceedings. Attorney Regardie further declared that he did not appear at the two judgment debtor proceedings and that he did not prepare the

DISPOSITION

The application for costs and sanctions of real party in interest, Robert Nolan Conrad, a law corporation, is granted. Jerome B. Rosenthal and his attorney Edwin J. Klein, Jr. jointly and severally shall pay the sum of $17,000 to Robert Nolan Conrad, a law corporation within 10 days after this order becomes final. (We have reason to believe that Edwin J. Klein, Jr. may be deceased. The sanction award is to be considered a personal debt against Klein and not a debt of his estate or of his law practice.)

The clerk of this court is directed to send a certified copy of this opinion to the Chief Trial Counsel of the Los Angeles

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petition nor the emergency application. Further, he declared he did not render any advice with regard to the preparation of the two documents and he noted that only attorney Klein signed the documents. Based on this declaration, we have not sanctioned attorney Regardie. We note however, that he cannot plead total ignorance of the tactics to be employed. Attorney Regardie was present at the motion to compel answers and the contempt motion and thus he knew the overall strategy.

Office of the State Bar of California. (Bus. & Prof. Code, Section 6086.7, subd. (c).)

NOT TO BE PUBLISHED.

ASHBY, J.

We concur:

TURNER, P.J.

GRIGNON, J.

APPENDIX

D. Order filed February 10, 1992 granting motion of Attorney Arnold G. Regardie to be relieved as attorney of record

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

Rec'd 2/19/92 8:30 PM

ROBERT NOLAN CONRAD, et al.,)
)
Plaintiffs and Respondents,)

v.

JEROME B. ROSENTHAL,

Defendant and Appellant.

2d Civil No. B050759
(Super. Ct. No. C545108)

O R D E R

THE COURT:

The motion of attorney Arnold G. Regardie to be relieved as attorney of record is granted effective the date this order is filed.

COURT OF APPEAL - SECOND DIST.
FILED
FEB 10 1992
JOSEPH A. LANE Clerk

Deputy Clerk

APPENDIX

E. Motion of Arnold G. Regardie to Withdraw As Attorney For Jerome B. Rosenthal; Memo of Points and Authorities, Declaration of Arnold G. Regardie In Support; Proposed Order, dated August 20, 1991 WITH ATTACHED EXHIBITS A THROUGH F

EDWIN J. KLEIN, JR.
ARNOLD G. REGARDIE, BAR NO. 39344
7437 Topanga Canyon Boulevard
Canoga Park, California 91303

(818) 704-7400

Attorney for Defendant,
Cross-Complainant and Appellant
JEROME B. ROSENTHAL

IN THE COURT OF APPEAL OF THE STATE OF CALIF.

FOR THE COUNTY OF LOS ANGELES

ROBERT NOLAN CONRAD, a Law Corporation (A California Professional Law Corporation); HARLAND N. GREEN, A Professional Corporation (a California Professional Law Corporation)	) CASE NO.C545108) 2d Civil) No.BO50759) (Related Appeal) BO 57140)
Plaintiffs,	) MOTION OF ARNOLD) G. REGARDIE TO) WITHDRAW AS) ATTORNEY FOR) JEROME B.) ROSENTHAL; MEMO) OF POINTS AND) AUTHORITIES,) DECLARATION OF) AGR IN SUPPORT; PROPOSED ORDER
vs.	
JEROME B. ROSENTHAL, an Individual and DOES 1 through 100, Inclusive	
Defendants	

TO: JEROME B. ROSENTHAL

Please take notice that ARNOLD G. REGARDIE hereby moves the court for an order that he be allowed to withdraw as attorney of

record for JEROME B. ROSENTHAL in the above-referenced appeals.

Said motion shall be and is based upon all of the pleadings files and records in this case the instant motion as well as the supporting declaration of ARNOLD G. REGARDIE.

Specifically, the motion is based upon the fact, as attested to by MR. REGARDIE in his declaration, that there has been a total, complete and irreparable breakdown in communications between MR. REGARDIE and MR. ROSENTHAL. Accordingly, MR. REGARDIE can no longer continue to represent MR. ROSENTHAL.

Dated: August 20, 1991.

Respectfully submitted,

/s/

ARNOLD G. REGARDIE

law42/rose.wd

MEMORANDUM OF POINTS AND AUTHORITIES

1. California Code of Civil Procedure, section 284 provides as follows:

> "The attorney in an action or a special proceeding may be changed at anytime before or after judgment or final determination, as follows:
>
> 1. Upon the consent of both client and attorney filed with the clerk, or entered upon the minutes;
>
> 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other."

California Rules of Court, Rule 376, provides in pertinent part as follows:

> "The notice shall be accompanied by a declaration stating in general terms and without compromising the confidentiality of the attorney-client relationship why a motion under Code of Civil Procedure section 284(2) is brought instead of filing a consent under Code of Civil Procedure section 284(1)."

Based upon the accompanying declaration of ARNOLD G. REGARDIE, it is respectfully submitted that MR. REGARDIE is no longer able to effectively represent JEROME B. ROSENTHAL in regard to the pending judgment debtor proceedings and that accordingly the

motion to withdraw as attorney of record should be granted.

Dated: August 20, 1992.

Respectfully Submitted,

/s/

ARNOLD G. REGARDIE

D53/ROSEN.MPA

DECLARATION OF ARNOLD G. REGARDIE

I. ARNOLD G. REGARDIE declare as follows:

1. I am an attorney at law and an active member of the California State Bar.

2. I am presently one of the attorneys of record for JEROME B. ROSENTHAL, DEFENDANT AND APPELLANT herein.

3. MR. ROSENTHAL refused my request to sign a substitution of attorney in regard to pending Superior Court matters. Hence, it was necessary for me to bring a motion to be relieved. Attached to my declaration as Exhibit "A" and incorporated herein by reference is a true and correct copy of the "opposition" filed by MR. ROSENTHAL to my motion to withdraw as attorney of record in the Superior Court. That motion was granted on August 7, 1991 by Department 82 of the court, the Honorable Stephen E. O'Neil, Judge, Presiding. A true and correct copy of the order dated August 9, 1991, is attached hereto

as Exhibit "B". As MR. ROSENTHAL's opposition clearly indicates, he has attacked me in every conceivable way. Needless to say even before this personal attack on me was filed in the Superior Court, my relationship with MR. ROSENTHAL had deteriorated to the point where I could no longer communicate with him, and there was and is a total, absolute, complete and irreparable breakdown in communications between us. His "opposition" is eloquent justification for my need to withdraw as attorney of record for him.

4. Current co-counsel, Edwin J. Klein, Jr., 1300 North La Brea, Inglewood, California 90302, will continue to represent MR. ROSENTHAL in all matters pending before this court.

5. The current office address for MR. ROSENTHAL is 6535 Wilshire Boulevard, Los Angeles, 90045, telephone (213) 658-6411. However, he is currently incarcerated at Los Angeles County Jail, 441 Bauchet Street, Los

Angeles, California 90012.

6. For all of the foregoing reasons, it is respectfully requested that the motion be granted and that I be allowed to withdraw as MR. ROSENTHAL's attorney of record.

I have personal knowledge of the foregoing facts and if called as a witness I could and would testify competently thereto.

Executed this 20th day of August, 1991 at Canoga Park, California.

/s/

ARNOLD G. REGARDIE
Declarant

JEROME B. ROSENTHAL
6535 Wilshire Boulevard
Los Angeles, California 90048

(818) 658-6411

(INTERIM IN PRO PER -
Re, and related to, this Motion)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ROBERT NOLAN CONRAD, a Law Corporation (A California Professional Law Corporation); HARLAND N. GREEN, A Professional Corporation (a California Professional Law Corporation)	CASE NO.C545108 DEFENDANT ROSENTHAL'S OPPOSITION TO REGARDIE'S AMENDED MOTION (FOR LEAVE) TO WITHDRAW AS ATTORNEY OF RECORD; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF ROSENTHAL - IN SUPPORT
Plaintiffs,	
vs.	
JEROME B. ROSENTHAL, an Individual and DOES 1 through 100, Inclusive	
Defendants	Date : August 6, 1991 Time : 8:30 a.m. Place: Dept. 82
AND RELATED CROSS ACTIONS.	Trial Date: None Discovery Cutoff Date: None

TO: JUDGE STEPHEN E. O'NEIL AND TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

Defendant ROSENTHAL respectfully submits this, his OPPOSITION TO ARNOLD G. REGARDIE'S AMENDED MOTION TO WITHDRAW AS ATTORNEY OF RECORD:

This Opposition is and will be based upon REGARDIE's Instant Motion, Plaintiff (CONRAD'S) RESPONSE to that Motion, the attached POINTS AND AUTHORITIES, the attached Declaration of JEROME B. ROSENTHAL, all of the pleadings, files and records in this case, and on such further and other matters as may be addressed to the Court at the hearing.

DATED: July 30, 1991.

JEROME B. ROSENTHAL

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LIST OF EXHIBITS

No.	Description
A	May 18, 1989 Retainer Agreement Between Regardie And Klein (Attorneys) And Rosenthal (Client). 5 pages
B	July 3, 1991 Memo From Arnold G. Regardie To Jerome B. Rosenthal, (Mailed to L.A. County Central Jail, Received 7/11/91). 1 page
C	May 10, 1991 Memo (Rosenthal's "Dictated But Not Read" To AGR and EJK. 2 pages
D	Order Denying Review, By California Supreme Court, In Rosenthal vs. Superior Court, Filed/Dated April 18, 1991. Conformed, (Signed) Lucas, Chief Justice.
E	Regardie Letter June 25, 1991 To R. Mann In Response To Mann Letter 6/19/91, With cc's to Klein and Rosenthal. 1 page
F	Regardie/Klein "Reply Of Petitioner In Opposition...." Dated April 18, 1991 - For, In Supreme Court of State of California, No. S057140. Cover and 5 pages. (NOT FILED - TOO LATE)

POINTS AND AUTHORITIES

I

REGARDIE IS CONTRACTUALLY AND ETHICALLY OBLIGATED NOT TO WITHDRAW

(JBR = ROSENTHAL, AGR = REGARDIE, EKJ = KLEIN)

1. The letter Retainer Agreement dated 5/18/89, EXH. "A" attached, drafted by Regardie, specifically obligates AGR as "lead counsel" (top of p. 2 Exh. "A"), to perform services which "include preparation for and conduct of **trial, writs, and appeals**" (p. 2, 2nd. para. of Exh. "A"). (Emphasis added).

Clearly, the post-judgment proceedings fall into the plain meaning of included services - i.e., "preparation for and conduct of trial, writ, and appeals." Supra.

2. Even if, **arguendo**, the post-judgment proceedings are not "included services" covered by the retainer agreement (Exh. "A"), those proceedings, and matters incident, were the subject of an oral agreement made between Regardie and Rosenthal that Regardie, Klein and Rendelman would render the services. That oral agreement was affirmed and ratified by

Regardie's conduct. Regardie rendered these ratifying services:

-Appeared **March 5, 1991** before Hon. Stephen E. O'Neil, Superior Court, Dept. 82, re three post-judgment matters, including OSC re Contempt, Commissioner Taylor's.....ordering "Mr. Rosenthal to answer...questions." (RT 3/5/91, p. 11, l. 20-23).

-Wrote his **April 11, 1991** letter to J. Ford, Esq. "strongly suggesting" that Ford file "an immediate appeal on behalf of Travelers Insurance Company from the denial of claim of exemption interposed by Travelers on behalf of Mr. Rosenthal, ".....denial took place in Department 85 on March 28, 1991....." a matter of prime importance to Mr. Rosenthal.

-Appeared **April 24, 1991** before Hon. Ronald M. Sohigian, Judge Superior Court Dept. 85 re two post-judgment motions (1) for permission to file a late claim of exemption "essentially", and (2) re "continued receivership proceedings." (RT 1:21-25).

-Prepared, signed and filed "APPELLANT'S OPPOSITION **May 21, 1991** TO RENEWED APPLICATION FOR SANCTIONS" in CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT,

together with Regardie's letter to Clerk, Division Five, Court of Appeal, re correction(s) in APPELLANT'S OPPOSITION.

3. Regardie is bound to honor his contractual and ethical obligations (supra) to his client Rosenthal.

California Business and Professions Code, Section 6068, and subsections referred to below provide, in pertinent part, that "It is the duty of the attorney to do all of the following":

> (d) To employ, for the purpose of maintaining the causes confided to him.....such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by any artifice or false statement of fact or law.

The very bringing (filing) of Regardie's motion "to withdraw" is in plain violation of sub-section (d); the details of some of Regardie's bad faith violations are set forth below, in the attached declaration.

> (h) Never to reject, for any consideration personal to himself...., the cause of the defenseless or the oppressed.

Here, Regardie's performance of services was so

substandard and incompetent (examples in attached declaration) that they resulted in an unthinkably adverse decision in the "main case". After thus by sheer gross negligence and incompetence, causing Rosenthal to lose his lifetime practice accumulations including rights to a fee and ultimately the fee itself (accrued gross value, about $4 million), and to lose his actual liberty (in jail since April 8, 1991). Also as a direct result of more Regardie incompetence and negligence, Regardie reached a new pinnacle, an all-time record for outrageous conduct - a scheme, plan and design by which Regardie seeks to abdicate any semblance of responsibility. Instead of protecting "the cause of the defenseless or the oppressed" (supra), Regardie seeks to further visit and visit unconscionable destruction on Rosenthal and thus contribute to his defenselessness and oppression. Regardie has fabricated and contrived a plan to deceive the Court(s) and to throw Rosenthal to the wolves - all for Regardie's own "consideration personal to himself." (Again, for factual details, please see attached declaration.)

Rule 6-101(A)(2) of the State Bar Rules of Professional Conduct requires an attorney to perform the services for which he is hired because the failure to do so can be an intentional

or reckless failure to perform competently, which is also a violation of the rule. Baker v State Bar (1989) 49 C.3d 804, 816-817, fn. 5. Similarly, Rule 2-111(A)(2) provides that an attorney shall not withdraw until he has taken steps to avoid foreseeable prejudice to the rights of the client. Baker, supra.

Regardie has clearly contravened, and is contravening (if not defying) both rules. (See attached declaration.)

II

REGARDIE'S STATED REASON FOR WITHDRAWAL (BREAKDOWN OF COMMUNICATIONS) LOGICALLY APPLIES TO ANY FURTHER REPRESENTATION; YET HE APPARENTLY (NOT CLEAR) WANTS TO CONTINUE SOME REPRESENTATION. THE "BREAKDOWN", IF TRUE, WAS UNILATERALLY CONTRIVED BY REGARDIE TO AVOID HIS OBLIGATIONS TO ROSENTHAL.

1. In his sworn Declaration attached to instant AMENDED MOTION TO WITHDRAW AS ATTORNEY OF RECORD (p/s July 5, 1991). Regardie says: "I am no longer able to continue my representation of...Rosenthal for the reason that there has been an irreparable breakdown in communications between us, and that consequently I am no longer able to effectively communicate with him." (Emphasis added). (Declaration

of...Regardie, July 1, 1991, p. 1, l. 5-8). Continuing, the Declaration states ".....it is respectfully requested that the Motion (to withdraw) be granted and that I be relieved as attorney of record for .....Rosenthal."

But, his MOTION TO WITHDRAW states that the Motion is "to withdraw as attorney of record for defendant.....Rosenthal in all judgment debtor proceedings." (Motion, p. 1, l. 23-24) (Emphasis added)

Which is it? Does he wish to withdraw from any further representation, including the pending appeal from the judgment in the case? Or only from representation in judgment debtor proceedings?

Obviously and logically, if he is no longer able to continue his representation, he cannot "represent" Rosenthal for any purpose! If he is unable to effectively communicate with Rosenthal....and he seeks to withdraw "as attorney of record" - how can he remain as attorney of record for one purpose (pending appeal(s)), and not for other purposes?

Hallelujah! Even Mr. Mann is in accord, finally! In his PLAINTIFF'S RESPONSE TO MOTION TO WITHDRAW, he states: "Finally, it seems odd that the Attorney-Client relationship could have deteriorated to the point where it is impossible

for Mr. Regardie to represent Rosenthal in the judgment debtor proceedings, but such relationship continues to be pleasant enough to permit Mr. Regardie to prosecute the appeal." [PLAINTIFF'S RESPONSE..." p. 3, l. 14-18].

2. There has not been a breakdown in communications "between us". It simply isn't true, Regardie's Declaration notwithstanding:

(a) No breakdown. Regardie continues to communicate when it suits his devious purpose of the moment. As recently as July 3, 1991, (See Exh. "B" attached), he replies to a Rosenthal communication (faxed memo 7/2/91) to him.

(b) "Breakdown" idea and label are the unilateral and misleading contrivance of Regardie. His declaration (replete with conclusions and opinions, and virtually devoid of any statements of fact) does not contain any statement of facts as to how the "breakdown" came about. The "breakdown" is not one "between us"; it (sometimes) when convenient to him) refers only to Regardie - not "between us"; "us" means, of course, Regardie and Rosenthal. Regardie unilaterally decided that he wouldn't communicate - and that he'd ignore Rosenthal's communications except when he (Regardie) chose to respond. (Exhibits "B" and "E"). For factual account of jail

conference (AGR and JBR), please see attached Rosenthal declaration, para. 6 and 7).

3. No stipulation (written) no jurisdiction, i.e. non-waivable jurisdictional infirmity. A nonconsensual (written, memorialized) order of general reference to a referee or commissioner, violates constitutional (Cal. Constitution VI, Section 22, 23), statutory (C.C.P. 259, 638, 639, 1211) and controlling decisional, International Ski Boat v Superior Court [1991] 91 Daily Journal, D.A.R. 8442, July 16, 1991 issue; In re Cowan, [1991] 91 Daily Journal D.A.R. 6383, June 14, 1991 issue; Aetna Life Insurance v Superior Court (1986) 182 CA3d 431, 436; 227 Cal.Rptr. 460, 463. The principles and authorities therefor are included here because the subject matters were discussed in the May 91 jailhouse meeting between Regardie and Rosenthal; (attached Declaration, para. 6 and 7), at which Regardie contends the "irreparable breakdown of communications between us" took place.

III

REGARDIE'S MOTION TO WITHDRAW IS FRIVOLOUS AND IN BAD FAITH, JUSTIFYING AND IMPELLING IMPOSITION OF SANCTIONS AGAINST HIM, IN FAVOR OF ROSENTHAL.

CODE OF CIVIL PROCEDURE 128.5

1. AGR's declaration states no facts upon which his pervasive conclusions are based. Without belaboring the obvious, those conclusions should be stricken and disregarded by the Court.

2. The Motion is frivolous and in bad faith:

(a) No facts are stated by AGR - as to **why** he should be "permitted to withdraw; (his Attorney-Client "privilege" excuse is neither pertinent nor assailing);

(b) The circumstances and situation to which the motion (apparently) relates (circumstances and situation further elucidated and supported by these (JBR) Opposition papers and exhibits) and by Plaintiff's Response...", p. 3, l. 14-16, are the total and unilateral creations of AGR himself. Thus, by his own bootstraps, he seeks to be somehow relieved of his untenable and indisputable obligations and duties owed to this Court and to his client JBR.

(c) Those duties are contractual and ethical under the provisions of the STATE BAR ACT and opinions of the California Supreme Court, including

California Business and Professions Code, Section 6068.

(d) AGR's "positions" are offensive to this Court, the judicial system, and to simple rationality and common sense; they must not be condoned and certainly not endorsed or approved by this Court, implicitly or expressly. To avoid any appearance of such condonation, endorsement or approval, the imposition of sanctions against AGR, in favor of JBR, is extraordinarily necessary (to "deter others") even if, as a practical matter, the Court sees a need to (provisionally and conditionally) grant the motion, wholly or partially. (see infra.)

IV

CONCLUSION, AND RELIEF REQUESTED

1. If the Court determines that the Motion should in any respect be granted, (a) the Motion should be continued to an expeditiously early date, before which Regardie is required to perform conditions and pay sanctions as may be imposed, or (b) the Court's order granting (not continuing) should require Regardie to pay sanctions and perform conditions (below).

2. Conditions and Sanctions (requested to be performed and paid by Regardie, at his expense)

(A). Conditions.

(1) Send to Rosenthal original or proper copies of all "papers" (all inclusive, intended) both received or generated by Regardie or Klein (except those provably previously sent to Rosenthal).

(2) Prepare, and send to Rosenthal, a detailed written report of all oral communications to, and those stated by Regardie and Klein or either of them, in connection with pre-trial, trial and post-trial periods, except those previously and provably reported to Rosenthal.

(3) Send to Rosenthal a fully detailed, completely legible accounting by AGR of use of funds entrusted (trust account) to AGR by JBR. The "accounting" should explain, with specific reference and detail, and trace the supporting documents (receipts, invoices, etc.) and references to check numbers, to specific entries in AGR trust account ledger to be supplied by AGR

to JBR (except to extent previously supplied in legible, intelligible form.)

(4) Reply with dispatch and in writing to all written requests to AGR, for information and documents related to this case concerning or occurring in pre-trial, trial and post-trial periods.

(5) File in California Supreme Court, together with appropriate explanation, the REPLY BRIEF prepared by AGR, EJK but not filed because Supreme Court denied Petition (and stay) April 18, 1991.

NOTE: A. If Regardie believes information or papers referred to above are truly or possibly Attorney Client confidential and thus privileged, he must first so inform JBR in writing. If privilege not waived by JBR in writing to AGR, or agreed by AGR - JBR to be inapplicable, application should be made to this Court for deposition.

B. All written communications (and amounts to be paid to JBR as sanctions, under (B) and/or (C) below) are to be brought by AGR or EJK or other State Bar member on behalf of JBR to Attorney

Conference (and reception) area, at Los Angeles County Central Jail - for as long as JBR is there; or AGR is notified in writing by JBR.

(B). Sanctions. (See "Conclusion" of JBR Declaration).

1. AGR to pay to JBR, on or before dates stated) unless otherwise ordered by Court), plus interest at 7% per annum from stated date;

-(a) August 19, 1991 - $37,500.00 for Travelers annuity payments paid to/for Conrad, up to August 6, 1991, and $12,500 for each quarter thereafter;

-(b) September 3, 1991 - If AGR withdraws from "underlying appeal" (from judgment by Hon. Ronald Cappai, Judge, this Court), $25,000 for defraying new attorney fees in re that (those appeals).

-(c) September 3, 1991 - $20,000 if AGR withdraws from appeals of, from post-judgment matters, including appeals, writs, petitions, motions, for defraying new attorney fees or concerning those appeals, and interim

matters.

-(d) September 17, 1991 - for each day of JBR incarceration, commencing April 18, 1991, $500.00.

(C) Other, Additional Conditions, Sanctions, Relief.

In lieu of or in addition to the Conditions and Sanctions stated above, such other amounts for such purposes as the Court may determine to be due therefor, by AGR to JBR.

(D)Amounts ordered to be paid by AGR to JBR as Sanctions under (B) and (C) above are not to be reached or reachable by levy, execution, garnishment or otherwise by or for CONRAD or GREEN, and are to be deemed to be exempt as living and related expenses.

Respectfully submitted.

DATED: July 30, 1991.

JEROME B. ROSENTHAL
In Pro Per, Re and Related
To This Motion

DECLARATION OF JEROME B. ROSENTHAL

I, JEROME B. ROSENTHAL, declare:

1. The retainer agreement (Exh. "A") was drafted by Regardie (AGR), and signed by him, by Edwin J. Klein, Jr., (EJK) and by me (JBR) on June 2, 1989, in my office.

2. In two discussions with AGR before June 2, 1989, I told AGR that I wanted and needed an arrangement under which he, as lead counsel, along with a co-counsel, and a research assistant would serve and represent me in all matters in the Conrad, Green vs/adv Rosenthal case. AGR stated that plan was acceptable to him and that he would prepare an agreement that would embody the "all services" idea. His preparation of Exhibit "A" followed, as did its execution.

3. In the pre-June 2nd discussions with AGR, I told him that the contingent percentage retainer fee proposed was intended to include the "all services" concept. He said he agreed.

4. After the end of the Conrad, Green vs/adv. Rosenthal trial, on at least three occasions, AGR told me that he intended the "all services" concept in the retainer agreement to include post judgment proceedings, matters, and post-judgment debtor proceedings, matters and that he had not

specified (in drafting Exh. "A") post-judgment matters because he never even imagined that Conrad, Green could or would prevail and procure a judgment against me. AGR said that at any rate, he, Klein and Rendelman would continue to serve so as to include the post-judgment and post-judgment debtor matters, as well as the trial "writs and appeals" which were specifically provided for in the retainer agreement, Exh. "A".

AGR and EJK did render such services, as illustrated in the accompanying Points and Authorities, Section I, subsection 2 thereof. The factual statements made therein are true and correct.

5. The incompetent, negligent and substandard services of AGR before and during trial are exemplified by these incidents and circumstances:

(a) He stipulated with an attorney for a witness for whom he had issued a trial subpoena that the service of the subpoena was invalid. That stipulation was signed by AGR without my knowledge and consent. When I asked him why he had thus excused a "key" witness whose testimony we profoundly needed, he said the service was "not good service." When I asked why, he said (parrot-like) and repeated that the service was not good

because it was not good service. We never did procure that testimony. After that abortive effort to procure the testimony, I (at his request) engaged special investigators to attempt service by constant vigil. They failed - and I spent about $5,000 for their efforts; the payments were made directly by me - i.e., not through AGR's trust account.

(b) AGR delegated to EJK the task of arranging for the taking of the deposition (in New York) of another key witness, whose testimony AGR agreed was expected to be extremely helpful. EJK failed to timely implement the procedure for the deposition - and that witness' testimony was also lost. AGR later (after trial) explained that once he even as "lead counsel" delegated a task or assignment to EJK (co-counsel), AGR had no responsibility to supervise, or even to monitor, to make certain that the task was performed. AGR restated that notion on many occasions (at least three), one of which was at the jail-house meeting with me - (May 1991), the same meeting at which AGR says I "insulted" him, and thus the "breakdown of communications between us" took place.

(c) Not later than one month after June 2, 1989, AGR assigned to EJK the task of applying for an appropriate extraordinary writ to reverse and preclude the crucially detrimental effect of a pre-trial summary adjudication of an issue; EJK accepted the assignment in my presence. The task was <u>never</u> performed; EJK later said he "never got around to it"; and AGR again stated that he was not obliged to, nor did he, monitor or supervise the once-delegated task.

6. AGR assigned to EJK the most-significant post-trial undertaking, i.e. to seek review and relief (in Court of Appeals and in California Supreme Court) from Hon. Stephen O'Neil's order(s) of contempt and incarceration of JBR. In his "Opposition of R.P.I. (Conrad) to AGR, EJK Habeas Corpus/Certiorari Petition to California Supreme Court" Robert Mann (Conrad counsel) stated "Rosenthal <u>stipulated</u> to such judicial officer (Commissioner Taylor) hearing the matter on not one but two occasions....". (Opposition, dated April 8, 1991, p. 3, para. 3). April 8, 1991 is the same day as that upon which Judge O'Neil sent me, JBR, to jail - where I am at this writing.

Mann's statement is a flat untruth. Rosenthal <u>never</u>

did stipulate, i.e. neither he nor his counsel.

AGR and EJK prepared a Reply to Mann's "OPPOSITION" but because AGR delayed in forwarding the Opposition to EJK (AGR sent it on the third day after AGR received it), and because EJK delayed until April 18, before the Reply was filed by AGR/EJK. THE REPLY WAS NEVER FILED! Please see Exhibits C, D, and F. The Supreme Court did not (and does not yet) know that Mann's statement (that Rosenthal stipulated to Commissioner Taylor's acting as judge) was an out-and-out falsehood! Moreover, Regardie refused to file the Reply "late", with an explanation and refused to write to the Supreme Court to advise of Mann's deceit in misleading that Court. So that not only was the Supreme Court misled (by Regardie and Klein negligent and incompetent acts), but so was Judge Stephen E. O'Neil, Superior Court Judge who literally was misled into thinking that the Supreme Court denied relief and, in some manner, approved (tacitly) his contempt and incarceration orders, and his order denying the Regardie, Klein Motion for Reconsideration. That order was entered May 20, 1991 (Minute Order).

What action would Judge O'Neil have taken if he knew that the Supreme Court had been misled by the deceit of Mann

and the negligent delay of Regardie, Klein? In reflecting on that question, it should be borne in mind that Judge O'Neil (I contend) had no jurisdiction (if, as I contend, Commissioner Taylor's orders (**if**, he made any, were **void**. The authorities are clear, in support of my contentions, i.e. no stipulation, no jurisdiction, hence Taylor order(s), **if** any made, are void; and Judge O'Neil has/had no jurisdiction to enforce such order(s). The jurisdictional defect is nonwaivable. See P & A, Section II, paras. 2 and 3.

7. For the first time since my incarceration (April 8), AGR visited and conferred with me at the L.A. County Jail in early May, some four weeks or so after I was locked-up.

In his DECLARATION (in support of WITHDRAWAL MOTION), Regardie says he is "precluded by the attorney-client privilege from revealing the details of the communications between us in this regard (Decl. p. 1:9, 10) i.e., "an irreparable breakdown in the communications between us." (**Id**. 1:8, 9). He is **not** thus precluded! The pertinent portions of our talk during that (**the only) Regardie visit** at the jail were not at all "confidential" in nature. His "privilege claim" is spurious and misleading; it becomes apparent that (it is **not** his privilege - it is mine) he is eager to cloak

his negligence and refused to rectify the attorney-client privilege, impermissibly urged by him.

On that occasion, I asked him why he had delayed the filing of our reply to Conrad/Mann's Opposition to our Emergency Petition and Request for Stay (in California Supreme Court); (please see Para. 6 - **supra**), and why he, as lead counsel, did not see to it that Ed Klein filed the Reply on time (so as to point our Mann's deception on the jurisdictional nature of "STIPULATION" as indispensable requirement.

AGR'S REPLIES:

(1) He sent the (Mann's) OPPOSITION to EJK for the preparation and filing of our REPLY (in California Supreme Court) as soon as "he could get around to it: without saying why (he refused) he couldn't and didn't sooner get around to it - all sooner than the third day;

(2) He was aware of the emergency nature of the matter before the Supreme Court, but that became "EJK's problem exclusively when and after he (AGR) had "assigned"/delegated the task to EJK", and that he, AGR as "lead counsel" was relieved of any responsibility, such as the duty to supervise or monitor his associate's (EKJ's) performance.

(3) (To my renewed request) he said that he would not in any way inform The Supreme Court, and others through it, of his and EJK's delay as the cause for the High Court's denial (Exhibit "D") of the Emergency Petition, so that our "Reply" was never filed and the Supreme Court was thus led to believe (Mann's statement that we (JBR, AGR, EJK) had "stipulated" (a total falsity); that he would not himself inform or explain to the Supreme Court, and would neither instruct nor permit EJK to do so.

(4) When I, (needlessly) observed that my very liberty was at stake, and asked him to reconsider his abject refusal to rectify the consequences of his (and EJK's) actions and omissions by disclosures to Supreme (appellate and trial) court(s), he said he would not agree to reconsider, he would let me know if and whether he "changed his mind". (I have not heard from him in that respect.)

In retrospect, I told AGR that I did not concur with or accept his replies, that I considered his positions as stated (in this para. 7, and in para. 5(a), (b) and (c) above) as being in dereliction of his legal and ethical duties, especially as "lead counsel." He replied that he was **insulted** by my statements - ! To that I responded that his thick-or-

thin skinned imperviousness or susceptibility, to totally true description of his acts was hardly if at all germane or relevant. He repeated that he felt "insulted" - and replied no further!

CONCLUSION

8. For years Travelers Life Insurance Company has paid to me $12,500 quarter-annually under an annuity policy (agreement) of which I am non-party designated beneficiary. Since **Conrad, Green** judgment herein, three such payments (totalling $37,500) have been paid to, for Conrad, and not to me. Policy contains "spendthrift" provisions. Regardie and Klein have each stated to me that they would take appropriate steps to judicially prevent such continued taking and to recover past taking, i.e. $7,500.00. Neither AGR nor EJK has made any such effort, in suit or otherwise.

9. If Regardie withdraws from "underlying appeals" i.e. from Hon. Ronald Cappai, Judge, Superior Court Judgment, this matter, the cost of his replacement (new attorney fees) will equal or exceed $25,000, conservatively estimated.

10. If Regardie "withdraws from" two additional appeals, (i.e. re disallowance of exemptions, and the contempt

and incarceration (both "post-judgment matters"), the cost of his replacement (new attorney fees) will equal or exceed $30,000 - conservatively estimated, including possible need to resort to federal, as well as state systems.

11. I have been incarcerated (for contempt) since April 8, 1991, some 110 days (approximate, minimum), without any interruption. To deter others from the outrageous conduct like that of Regardie, as well as to partially compensate me for losses of income and for business expenses attributable directly from the acts and omissions of Regardie as stated and referred to in this Opposition, P & A, and Declaration, I request (see P & A, Section IV, "CONCLUSION AND RELIEF REQUESTED" at end of P & A) as Sanctions, that AGR pay to me $500.00 for each day of my incarceration, commencing (not from its April 8 beginning) April 18, 1991. That is the day upon which the California Supreme Court denied review, i.e. my petition and request for stay (emergency), Exh. "D" without ever seeing Regardie/Klein prepared "REPLY....", dated April 18, 1991, but never filed - AGR (EJK) refused - although their delay in preparation prevented timely filing (i.e. before High Court Order). (This omission, negligence and continuing refusal or inaction by Regardie - is more fully explained

above, and in P & A).

12. I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California on July 30, 1991.

JEROME B. ROSENTHAL
Declarant

EXHIBITS A - F (INCL.) FOLLOW

EXHIBIT A TO APPENDIX E

Warner Center
5850 Canoga Ave.
Woodland Hills, CA
91367
(818) 704-7400

May 18, 1989

Mr. Jerome B. Rosenthal
6535 Wilshire Boulevard
Los Angeles, CA 90048

Re: Retainer Agreement
Conrad, et al. v Rosenthal and Related
Cross-Actions

Dear Jerry:

This confirms our agreement regarding our representation of you in the following Superior Court actions, [herein sometimes "Conrad, Green matters] now pending in L.A. Superior Court: Nos. 545 108, C 476 121, and C 480 712 (hereafter, "the case.")

You will advance all costs and out of pocket expenses in connection with the Conrad, Green matters, by your remittance to Arnold G. Regardie's Client's Trust Account, at his request. An accounting for all trust account disbursements will be provided to you, either at the end of the trial or settlement of the

case or before, at your request. All costs and expenses are to be paid by you as they are incurred. If, for any reason, we are called upon to advance any costs or expenses, you agree to immediately reimburse us for the same on demand. The costs and expenses include, but are not limited to any future monetary fees imposed against you and your attorneys of record, expert witness fees, costs and expenses, messenger costs, reproduction costs, filing fees, court reporter fees (deposition, trial and hearing transcripts), process serving fees, jury fees and deposits, investigation expenses paid or incurred to outside investigators, bond premiums, out of L.A. County travel and transportation expenses, long distance telephone charges, any other costs of suit not specified above and in addition those costs defined by C.C.P. Section 1033.5.

We agree to represent you as your attorneys in the Conrad, Green matter, both in your capacity as a defendant and as a cross-complainant, and to fully cooperate with each other in representing you in this regard. Arnold G. Regardie is to be lead counsel and Edwin J. Klein is to be associate counsel.

Our services covered by the contingent fee in the Conrad, Green matter include preparation for and conduct of trial, writs and appeals. The particular aspects to be initiated and finished as soon as practicable, on a priority basis, include:

-Initiating new discovery, and completing any unfinished discovery;
-Responding to the discovery by Conrad and/or Green;

-Interviewing, by us, or by outside investigator(s), of witnesses designated by you; taking their depositions, when necessary;

-Amending and/or supplementing cross-complaint; and

-Preparing and prosecuting motions incident to or in aid of the foregoing items listed immediately above.

We will handle the Conrad, Green matters on a contingent fee basis, with our fee being a percentage of the gross amount recovered on your behalf, according to the following formula:

1. Out of the first million dollars recovered on your behalf, our fee will be an

amount equal to 30% with an additional 5% for the research assistant.

2. Out of the second million dollars recovered on your behalf, our fee will be an amount equal to 35%, with an additional 5% for the research assistant.

3. Out of any sums in excess of two million dollars recovered on your behalf, our fee will be an amount equal to 40%; with an additional 5% for the research assistant.

It has been agreed that the foregoing fee is to be divided 66 2/3 to Regardie and 33 1/3 to Klein, applicable to the "gross amount recovered", as explained below. Gross amount received means without deduction for any amounts, whether for predecessor attorneys, costs, fees, and out of pocket expenses incurred or paid for by Jerome B. Rosenthal in connection with the case, except as hereafter

provided; gross amount received shall be reduced by no more than $40,000 for costs of suit incurred by you. For purposes of this $40,000, the costs are defined in paragraph 2, page 1 of the agreement.

The above percentages apply to the amount(s) hereafter recovered by you in the Conrad, Green matters. You have told us that the Heinzes paid you $700,000 (gross, less some $250,000 attached or in dispute, and less other amounts), that the $700,000 is not part of the approximately three million "stake" held by City National Bank, and that Conrad, Green, et al may claim all or part of the $700,000 (or net amount you derived therefrom). We will defend you in resisting their claims, but neither we nor the assistant is to be paid for that/those services, since the percentages applied to the other amounts

recovered on your behalf (as particularized) are intended to cover services rendered in resisting/defending against those claims concerning the $700,000. It is our understanding that the claims of Conrad and Green to the $700,000 are embodied in a supplemental complaint.

In addition, we have engaged an assistant, whose name is James D. Rendleman. He is an attorney licensed to practice in California, and has agreed to help us in the Conrad, Green matters. Our choice of the assistant is subject to your approval, which you orally have given us. The idea of the assistant was suggested by you and accepted by us in view of the voluminousness of files and papers, and the complexity and importance of the Conrad, Green matters.

However, the decision to employ or not such a research assistant shall be ours alone, and if we elect to discontinue the use of said assistant, the 5% of the fee otherwise payable for said assistant shall belong to us instead, subject to our being responsible for any amount due to the research assistant. We hereby agree to indemnify and hold you harmless from any claims of said assistant, provided that we or the assistant receive the above-mentioned 5% fee.

We are granted a lien on the proceeds of any monies recovered on your behalf, whether by way of settlement or judgment, to the extent of our contingent fee, as set forth above, and any costs and/or expenses we may have advanced which are unreimbursed by you at the time said moneys are recovered. Our assistant will have a lien on any such moneys to the extent of his

contingent fee as set forth above. You agree to execute, at the time this agreement is signed, a UCC-1 reflecting the lien of Arnold G. Regardie, Edwin J. Klein, Jr. and James D. Rendleman as described herein.

In connection with the Conrad, Green matters, you have represented to us that there is on deposit in a branch of City National Bank, in a certain trust account, which is specifically intended to pay the winner of said litigation; you represent and warrant that the amount now on deposit in said account is in the approximate amount of $3,000,000 (three million dollars).

We understand that you were previously represented in the Conrad, Green matters by attorney Bruce A. Friedman, and other attorneys. We will defend you without charge

if either Bruce A. Friedman, David Frank, Geoffrey Pope and/or Anne Koza (but not Richard Agay) files a Superior Court action against you claiming attorneys fees arising out of their involvement in the above-referenced litigation.

You acknowledge that we have made no guarantee as to the outcome or the amounts recoverable in connection with this litigation. Our comments about the outcome of your matter are expressions of our opinion only.

You acknowledge that you have been advised by us and are aware that contingency fee arrangements are not set by law, and that a contingency fee between attorney and client is negotiable.

You agree to fully reveal all facts concerning the case to us, to cooperate with us, to keep us informed of developments, and to keep us advised of your address, telephone number and whereabouts.

No settlement in this matter will be made without your written consent, which you agree shall not be unreasonably withheld.

Finally, we agree that if any dispute arises as a result of this agreement, or the performance of either of us pursuant hereto, said dispute will be submitted to binding arbitration before an arbitrator of the L.A. County Bar Association. The arbitrator's decision shall be binding, final, and may be entered as a judgment in a court of competent jurisdiction, and no other proceedings, in court or otherwise, shall be brought to

resolve such a dispute, except as provided by law. The prevailing party in said arbitration shall be entitled to attorneys' fees and costs.

This agreement shall be and is binding on and shall inure to the benefit of the parties hereto and their respective heirs, assigns, personal representatives (which includes executors and administrators) and successors in interest.

If this letter is acceptable to you and is in accordance with your understanding of our agreement, please sign below in the space indicated.

We look forward to a cordial and profitable relationship between us.

Sincerely,

/s/ Arnold G. Regardie-/s/ Edwin J. Klein,Jr.

I have read, understand and agree to all the terms and conditions set forth in this letter.

Dated: /s/ Jerome B. Rosenthal

EXHIBIT B TO APPENDIX E

MEMORANDUM

TO: JEROME B. ROSENTHAL

FROM: ARNOLD G. REGARDIE

DATE: July 3, 1991

Regarding your faxed memorandum dated, July 2, 1991, you are advised to specify which items concerning the trust account you question. You are further advised that every penny in the trust account was spent for CONRAD VS. ROSENTHAL, as you well know. I greatly resent your accusations of misappropriation. You have had the opportunity in the past to review the ledger sheets concerning the trust account, have reviewed them, and have never questioned anything other than the expenditure for a special typist to type your post trial motions. This money was reimbursed to the account to accommodate you, although it is clearly in my opinion a proper expenditure and within the purview of the retainer agreement. In any event, specify which items you believe require further explanation and/or

documentation and it will be furnished.

Next, Ed Klein is continuing the representation of you concerning whatever matters he/you believe require representation. Upon the occasion of our last conversation at the county jail, you were clearly advised by me that I would not continue to represent you. You know the reasons why.

Last, until you reimburse me for outstanding bills, regarding messenger, fax and xerox, as indicated in the memorandum sent to you with the trust fund accounting, (at least approximately $500.00) you are requested not to fax any further documents to my office, because faxes cost money. Bonnie may either messenger them at her/your expense, or may send them by mail.

EXHIBIT C TO APPENDIX E

May 10, 1991
JBR vs/adv Con., Grn.

MEMO TO AGR AND EJK

FROM JBR

Bonnie told me today that Ed and Arnie are not coming to see me today, per Arnie's telephone conversation with Bonnie.

Bonnie also told me that Arnie asked for my comments regarding two response briefs "in writing." Impossible from here! Reason: As I told Arnie and Ed, I do not have a copy of our Opening Brief. I have no exhibits and no Reporters Transcripts. Also impossible because Bonnie's visits limited to 20 minutes - not enough time to dictate extensive comments I have, all of which were prepared for expected meeting with both of you per Ed's statement 5/8.

If you or either of you expect me (where it is impossible or extremely difficult) to put all

MEMO TO AGR AND EJK

FROM JBR

---

comments to you "in writing", please do the same and also use messenger because mails stay in receiving room unpredictable time, so do messenger-deliver letters, etc.

Bonnie also advised that today Arnie told her orally that O'Neil hearing continued from 5/13 to 5/20. Demand that you immediately have hearing before O'Neil transferred to another judge or set for another court for hearing on 5/13. You have already caused at least one week delay because of your failure to file O'Neil Motion for Reconsideration and relief to be heard on 5/6 or 5/7.

In response to my question as to why not heard sooner than the 13th set for O'Neil, or why O'Neil hearing not possible with order

MEMO TO AGR AND EJK

FROM JBR

---

shortening time, Ed reply was (1) overlooked sooner filing and (2) afraid adopt request for order shortening time for fear that he and Arnie would be sanctioned for not timely filing which would have made unnecessary any shortening of time.

If Arnie wants documents or other things from me, let him come and ask me or let him put request in writing and send to Bonnie who will try to bring to me. Officials will not always let lay persons deliver documents to me but will let attorneys.

Preceding sentence applies at this moment to Arnie's oral request to Bonnie for copy of civil rights suit, and to Arnie's request for copy of complaints in which California Supreme

MEMO TO AGR AND EJK

FROM JBR

Court Justices were named as defendants, and any other documents which Arnie and Ed may want in the future.

Bonnie advises that Arnie has orally reported that Appellate Division 5 is now to hear Mann's Motion for Sanctions per Supreme Court direction. If both of you do not file response which includes your accurate statement that Arnie delayed sending Conrad Opposition to our California Supreme Court Petition for at least two days before sending to Ed for action and that Ed delayed another four days before finish filing, all with result that Supreme Court made decision denying Petition and Stay on 4/18, before Ed's Reply of Petitioner to Opposition of Real Party In Interest to Emergency Habeas

MEMO TO AGR AND EJK

FROM JBR

Corpus/Certiorari Petition For Review of Contempt Order could be filed.

Those two delays, plus both of your refusals to file the document late with explanation of your delays, and your subsequent failure to prepare and file appropriate request for reconsideration reporting to court your delays as reason.

If you refuse this or any other request, put it in writing. If Bonnie is not able to deliver to me, she can show me your refusals.

You are both on notice that if you refuse to so inform Supreme Court and properly inform Appellate Court of your delays which caused non-filing in Supreme Court, I will myself

MEMO TO AGR AND EJK

FROM JBR

---

directly inform Supreme Court and Appellate Court.

As I understood Bonnie's report of Arnie's reason why he did not come here per my request, is because I "abused and insulted" him. I find it strange and both ethically and legally improper for Arnie to consider the need to face the consequences of his dereliction, acts and omissions, and to treat a demand that he face those consequences as insults.

Overall, I suggest that Arnie and Ed, Arnie especially, put aside his professed "sensitivity to insults and abuse" and immediately change both of your tactics, and come to jail to visit and fully deal with

MEMO TO AGR AND EJK

FROM JBR

---

various matters and impending possible detriment in efficient cooperative manner. The three of us "can fight with each other" later. Now and immediately we need to cooperate to achieve united efforts and maximize our position in dealing with potential adversities as well as potential victories or benefits. —

JBR

JBR:bd

510agr

DICTATED BUT NOT READ

EXHIBIT D TO APPENDIX E

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District, Division Seven,
No. B057140 - SO20361

IN THE SUPREME COURT OF THE STATE OF CALIF.

IN BANK

SUPREME COURT
FILED
APR 18 1991
Robert Wandruff Clerk
DEPUTY

JEROME B. ROSENTHAL, Petitioner

v.

SUPERIOR COURT FOR THE COUNTRY OF LOS ANGELES, Respondent
ROBERT NOLAN CONRAD, Real Party in Interest

Application for stay and petition for review DENIED without prejudice to a renewed application by Real Parties to the Court of Appeal Second Appellate District, Division Seven, for their costs and for sanctions based on the Petition for Writ of Mandate, etc., filed with the Court of Appeal on March 25, 1991, and the Emergency Application for Immediate Stay Order and Emergency Habeas Corpus/Certiorari Petition, Etc., filed with this court on April 8, 1991. (Code of Civ. Proc. section 907; Bus. and Prof. Code section

6068, subd. (d); Cal.Rules of Court, rule 26(a).)

LUCAS
Chief Justice

EXHIBIT E TO APPENDIX E

LAW OFFICES ARNOLD G. REGARDIE
7437 Topanga Canyon Boulevard
Canoga Park, CA 91303
(818) 704-7400

June 25, 1991

Mr. Robert Mann
Fierstein & Sturman
Law Corporation
Suite 1500
1875 Century Park East
Los Angeles, CA 90067

RE: Conrad vs. Rosenthal

Dear Mr. Mann:

This will acknowledge your letter dated, June 19, 1991. The decision to formally withdraw a attorney of record had already been reached before your letter was received, and is in progress. However, until that has been done you are requested to serve Ed Klein with any and all communications concerning the recent appeals because he alone is handling those appeals and not this office.

With regard to your comments concerning the underlying appeal, apparently you did not read appellant's opening and closing briefs. The appeal is eminently meritorious, a conclusion

which the court of appeal, I am confident, will also reach, in conjunction, with your misstatements of the record, as pointed out in the reply brief.

Sincerely,

/s/

Arnold G. Regardie

cc: Mr. Ed Klein, Jr.
Mr. Jerome B. Rosenthal

EXHIBIT F TO APPENDIX E

No. LASC C 545108
Second Appellate District No. B057140
California Supreme Ct. No. SO57140

SUPREME COURT OF THE STATE OF CALIFORNIA

JEROME B. ROSENTHAL

Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA OF THE COUNTY OF LOS ANGELES

Respondent

ROBERT NOLAN CONRAD, A LAW CORPORATION; ROBERT NOLAN CONRAD, AN INDIVIDUAL; HARLAND N. GREEN, A PROFESSIONAL CORPORATION

Real Parties in Interest.

REPLY OF PETITIONER TO OPPOSITION OF REAL PARTY IN INTEREST TO EMERGENCY HABEAS CORPUS/CERTIORARI PETITION FOR REVIEW OF CONTEMPT ORDER

ARNOLD G. REGARDIE, ESQ.
ED KLEIN, JR., EQS.
7437 Topanga Canyon
Canoga Park, CA
Attys for Petitioner
JEROME B. ROSENTHAL

TO THE HONORABLE JUSTICES OF THE CALIFORNIA SUPREME COURT, AND TO THE PARTIES HERETO AND THEIR ATTORNEYS OF RECORD;

Petitioner, JEROME B. ROSENTHAL submits his Reply to the Answer ("Opposition") of the Real Party In Interest, ROBERT NOLAN CONRAD, et al.:

MEMORANDUM OF POINTS AND AUTHORITIES

I

THE REAL PARTY IN INTEREST'S OPPOSITION VIOLATES CRC RULE 28 (6)

California Rules of Court Section 28 (6) limits an Answer to a Petition to 25 pages, excluding any evidentiary exhibits that do not exceed 10 pages. Real Party in Interest ROBERT NOLAN CONRAD'S ("Conrad") Answer greatly exceeds this length, and accordingly violates this rule.

Petitioner JEROME B. ROSENTHAL ("Rosenthal") limited the length of his Petition to comply with the rule, and thus is at a disadvantage with respect to his use of

the evidentiary exhibits.

II

PETITIONER DID NOT STIPULATE TO A COMMISSIONER

Conrad falsely contends that counsel for Petitioner stipulated to the judgment debtor hearing before Commissioner Taylor. Yet Conrad produces no evidence of a written stipulation, because there was none. Further, there is no express oral stipulation in the record by Petitioner or his counsel for the Commissioner to hear the matter.

Conrad produces no authority for his position that the submission of Points and Authorities on the availability of the Fifth Amendment constitutes a stipulation, or that the appearance before the commissioner constitutes a waiver. Conrad's argument, therefore, is without legal justification or authority.

Both the California Constitution, Article VI, Section 22, and the Code of Civil

Procedure, Section 259 limit the authority and jurisdiction of a Commissioner. Absent a **written consent** of an appearing party, the Commissioner's authority and jurisdiction to act are limited to subordinate judicial duties. As held in In re Wren (1957) 48 Cal.2d 159, 163 the disobedience of a void order made in excess of the jurisdiction of the Court does not constitute a contempt. In In Re Robert S (1968 197 Cal.App.3d 1261, the court held that without a valid stipulation, the Court is without jurisdiction and any judgment or order is void.

Mere appearance before the Commissioner does not constitute a waiver. In Nierenberg v Superior Court (1976) 59 Cal.App.3d 611, the commissioner, sitting as a judge pro temore cited a public defender for contempt. The Court of Appeal held that the public defender's agreement to defer adjudication of the contempt until after trial of the underlying action and his request for

continuance of contempt proceedings after trial did not amount to stipulation to the commissioner's authority.

Petitioner's judgment debtor examination was conducted outside the presence of the court commissioner. The only appearances before the Commissioner regarded the issue of the availability of the 5th Amendment privilege. As previously quoted in Petitioner's Petition, page 20, the Commissioner expressly stated that another Court would determine the availability of the privilege.

Accordingly, petitioner did not stipulate by his conduct to have the Commissioner determine the availability of the privilege since the Commissioner was not making that determination.

III

THE TROY STANDARD THAT IN A JUDGMENT DEBTOR PROCEEDING THE DEBTOR CANNOT SHOW THAT HIS FEAR OF INCRIMINATION IS REASONABLE UNLESS

HE CAN SHOW THERE ARE THREATENED OR PENDING CRIMINAL PROCEEDINGS AGAINST HIM IS UNCONSTITUTIONAL

Conrad contends, and the superior court agreed, that unless petitioner could show that a criminal proceedings against him was either pending or threatened, he could not claim the privilege to remain silent at a judgment debtor proceeding, under the holding of Troy v Superior Court, (1986) 186 Cal.App.3d 1006, 231 Cal.Rptr. 108. Commissioner Taylor noted, however, that Troy was distinguishable on its facts since Troy had already been incarcerated and presumably was immune from further prosecution because of the constitutional prohibition against double jeopardy. Such is not the case here.

If Troy is indeed the standard, then petitioner must confess to a crime and hope no later criminal prosecution results, or commit perjury. That could not have been the intent of the 5th Amendment. Rather, as stated in

Zonver v Superior Court 270 Cal.App.2d 613, the witness does not have to demonstrate conclusively that the answers to the questions will make him subject to prosecution or likely conviction. Once the point is reached where "reasonable judicial imagination" can take over, the witness may remain silent.

VI. SANCTIONS SHOULD BE DENIED, OR ALTERNATIVELY AWARDED TO PETITIONER

Conrad contends that the petition is frivolous and solely taken for the purpose of delay.

Mr. Rosenthal is incarcerated, in poor health and advanced age. It is hardly frivolous that he has maintained his right to remain silent. Petitioner faces life imprisonment should he continue to refuse to answer.

Petitioner seeks relief from this court, for which Conrad contends he and his counsel should be sanctioned. As he has done throughout the trial and post-judgment

proceedings, Conrad continues to cite Day v Rosenthal, 170 Cal.App.3d 1125, Rosenthal v State Bar 43 Cal.3d 612, Young v Rosenthal, and other Rosenthal cases in an effort to prejudice the court against him. Conrad has also unsuccessfully sought sanctions in virtually every effort by Rosenthal to assert his rights and claims.

It is Conrad and his counsel's conduct which is abusive in seeking sanctions, and the frequency with which they raise this issue has breached the boundary of good faith. Accordingly, if monetary sanctions are to be granted, it should be against Conrad and his counsel for attempting to bludgeon Rosenthal with sanctions at every turn.

Rosenthal's imprisonment is sanction enough. His assertion of his constitutional right to remain silent and his seeking relief from incarceration is not sanctionable.

Date: April 18, 1991.

ARNOLD G. REGARDIE
ED KLEIN, JR.

APPENDIX

F. Rosenthal's Response to Motion of Arnold G. Regardie's To Withdraw As Attorney For Jerome B. Rosenthal; Memorandum of Points and Authorities; Declaration of Rosenthal In Support; Exhibits WITH ATTACHED EXHIBITS A THROUGH H

*Jerome B. Rosenthal
Booking #2502015;
Dorm #7001
P. O. Box 80164 -
Terminal Annex
Los Angeles, CA
90086-0164
and
6535 Wilshire Blvd.
Los Angeles, CA 90048

*NOTE: To avoid 8-day delay in delivery,pls. (A) mail to both adresses and (B) have attorney or uniformed/ identified court personnel personally deliver to Jerome B. Rosenthal,c/o L.A. County Jail,441 Bauchet St. L.A. CA 90012

IN THE COURT OF APPEAL OF THE STATE OF CALIF.

FOR THE COUNTY OF LOS ANGELES

ROBERT NOLAN CONRAD, a Law Corporation (A California Professional Law Corporation); HARLAND N. GREEN, A Professional Corporation (a California Professional Law Corporation) Plaintiffs, vs. JEROME B. ROSENTHAL, an Individual and DOES 1 through 100, Inclusive Defendants	)LASC No.C 545108))CASE NO. B050757)(Related Appeal:) BO 57140)) ROSENTHAL'S) RESPONSE TO) MOTION) OF ARNOLD G.) REGARDIE's TO) WITHDRAW AS) ATTORNEY FOR)JEROME B.) ROSENTHAL;) MEMORANDUM OF) POINTS AND) AUTHORITIES;) DECLARATION OF) ROSENTHAL) IN SUPPORT;) EXHIBITS

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II. REGARDIE IS CONTRACTUALLY, ETHICALLY, LEGALLY AND MORALLY OBLIGATED NOT TO WITHDRAW; THUS HIS NON-DESIRABLE WITHDRAWAL SHOULD BE PERMITTED ON CONDITIONS AND WITH SANCTIONS IMPOSED ON HIM BY THIS COURT 6

III. REGARDIE'S STATED REASON FOR WITHDRAWAL [BREAKDOWN OF COMMUNICATIONS] ("BETWEEN JBR & AGR") LOGICALLY APPLIED IN SUPERIOR COURT, AND HERE APPLIES TO ANY FURTHER REPRESENTATION; YET HE APPARENTLY (NOT CLEAR) WANTS TO CONTINUE SOME REPRESENTATION. THE "BREAKDOWN", IF TRUE, WAS UNILATERALLY CONTRIVED BY REGARDIE TO AVOID HIS OBLIGATIONS TO ROSENTHAL. THERE WAS AND IS NO "BREAKDOWN...BETWEEN" US. "BREAKDOWN" IS ONLY REGARDIE'S. 10

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LIST OF EXHIBITS

No.	Description
A	May 18, 1989 Retainer Agreement Between Regardie And Klein (Attorneys) And Rosenthal (Client). 5 pages
B	July 3, 1991 Memo From Arnold G. Regardie To Jerome B. Rosenthal, (Mailed to L.A. County Central Jail, Received 7/11/91). 1 page
C	May 10, 1991 Memo (Rosenthal's "Dictated But Not Read" To AGR and EJK. 2 pages
D	Order Denying Review, By California Supreme Court, In Rosenthal vs. Superior Court, Filed/Dated April 18, 1991. Conformed, (Signed) Lucas, Chief Justice. (Received by AGR, by FAX, **before** AGR/EJK filed Exhibit "F", infra)
E	Regardie Letter June 25, 1991 To R. Mann In Response To Mann Letter 6/19/91, With cc's to Klein and Rosenthal. 1 page

F Regardie/Klein "Reply Of Petitioner In Opposition...." Dated April 18, 1991 - For, In Supreme Court of State of California, No. S057140. Cover and 5 pages. (NOT FILED - TOO LATE, DUE TO AGR/EJK DELAY)

G JBR letter to Hon. Stephen E. O'Neil, Judge, L.A. Superior Court, August 8, 1991 (with Proof of Service to attached list) citing cases showing that Superior Court (O'Neill, J.) had no jurisdiction re AGR's Motion to Withdraw, heard August 6, 19921

H Minute Order, Hon. Stephen E. O'Neil, Judge, L.A. Superior Court, May 20, 1991

*Jerome B. Rosenthal
Booking #2502015;
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P. O. Box 80164 -
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*NOTE: To avoid 8-day delay in delivery,pls. (A) mail to both adresses and (B) have attorney or uniformed/ identified court personnel personally deliver to Jerome B. Rosenthal,c/o L.A. County Jail,441 Bauchet St. L.A. CA 90012

IN THE COURT OF APPEAL OF THE STATE OF CALIF.

FOR THE COUNTY OF LOS ANGELES

ROBERT NOLAN CONRAD, a Law Corporation (A California Professional Law Corporation); HARLAND N. GREEN, A Professional Corporation (a California Professional Law Corporation) Plaintiffs, vs. JEROME B. ROSENTHAL, an Individual and DOES 1 through 100, Inclusive Defendants	LASC No.C 545108) CASE NO. B050757 (Related Appeal: BO 57140) ROSENTHAL'S RESPONSE TO MOTION OF ARNOLD G. REGARDIE's TO WITHDRAW AS ATTORNEY FOR JEROME B. ROSENTHAL; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF ROSENTHAL IN SUPPORT; EXHIBITS

TO: THE HONORABLE JUSTICES OF THE COURT OF APPEAL, TO ARNOLD G. REGARDIE, AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

JEROME B. ROSENTHAL'S RESPONSE TO ARNOLD G. REGARDIE'S "MOTION TO WITHDRAW" AS ATTORNEY OF RECORD FOR JEROME B. ROSENTHAL; MEMORANDUM OF POINTS AND AUTHORITIES, DECLARATION OF ARNOLD G. REGARDIE IN SUPPORT, EXHIBITS:

This Response shall be and is based upon all of the pleadings, files and records in this case, this instant response and accompanying documents, pertinent (portions) of Reporters' Transcripts, the instant motion (to which this Response is directed) including documents attached or referred to in that motion, and upon the supporting Declaration of Jerome B. Rosenthal, and accompanying Memorandum of Points and Authorities.

In addition and more specifically this Response shall be and is based upon the fact(s), that as more fully set forth in the accompanying supporting Declaration of

Rosenthal (Responding Party), reflecting, in part:

(a) Mr. Regardie's Supporting Declaration is virtually entirely non-factual and conclusionary (to which extent should be ignored, stricken);

(b) That (same) Declaration is incomplete, incorrect, and misleading (to this Court, as was also true of Mr. Regardie's presentation to the Superior Court, to which his (that) Declaration (August 20, 1991) refers);

(c) That Mr. Regardie's statement (August 20, 1991 Declaration) that "there was and is a total, absolute, complete and irreparable breakdown in communications between us" is a blatant falsehood;

(d) That the Superior Court had no jurisdiction to enter the Order

(granted August 6, and dated August 9, 1991 by Department 82 of the Court, the Honorable Stephen E. O'Neil, Judge) [Order is Exhibit "B" to Mr. Regardie's Declaration (August 20, 1991)], and consequently that Order is void;

(e) That the circumstances underlying Mr. Regardie's Motion are of his own doing, and indeed were created solely by him in a reprehensible effort to abdicate and shirk his legal, ethical, moral and contractual duties to his client;

(f) Further, as stated, contained in instant RESPONSE, with accompanying documents, of Rosenthal.

NOTE: In short, Responding Party (Rosenthal) does **not** oppose the Motion that Mr. Regardie should no longer be Rosenthal's attorney. Rather, Rosenthal contends that This Court **should** (if it sees fit to grant the Regardie

withdrawal motion) grant it on (1) specified conditions, precedent or subsequent, to be performed by Mr. Regardie, and (2) with its imposition of appropriate sanctions on Mr. Regardie, in favor of this Court and in favor of Mr. Rosenthal.

DATED: September 6, 1991.

Respectfully submitted,

JEROME B. ROSENTHAL
Defendant, Cross-Complainant, Appellant, In Pro Per, THIS MATTER

POINTS AND AUTHORITIES, DECLARATION (ROSENTHAL), EXHIBITS FOLLOW

MEMORANDUM OF POINTS AND AUTHORITIES

(AGR = REGARDIE; EJK = KLEIN; JBR = ROSENTHAL)

I

[Please also see IV, infra, this Memo of P & A]

AGR'S DECLARATION (August 20, 1991) IN SUPPORT OF HIS INSTANT MOTION...TO WITHDRAW AS ATTORNEY OF RECORD, ISA NULLITY, FATALLY DEFECTIVE FOR FAILURE TO STATE THAT ITS CONTENT IS TRUE AND CORRECT AND MADE UNDER PENALTY OF PERJURY, AS REQUIRED BY C.C.P. 2015.5. CONSEQUENCE? JBR DEFERS TO THE COURT.

1. The AGR Declaration does not recite that its content is "true and correct...under penalty of perjury", as is plainly required by Code of Civil Procedure, Section 2015.5. Thus the purported Declaration is fatally defective and a legal nullity - i.e., it is functionally no declaration at all.

[Incidental Questions: Is the omission an oversight, or a deliberate one, due to seriously false statements in the "Declaration"?]

2. JBR defers to the Court for the disposition of this question: Should the

Declaration be disregarded? If disregarded, there would be no competent evidence before the Court to support the motion. Conceivably that "failure of proof" could suggest, if not strongly impel the denial of the "Motion to Withdraw."

But, subject to any contrary view by this Court, to which JBR unhesitatingly defers, JBR's preference is, as more fully discussed below, that the Motion be granted on stated conditions, and that concomitantly AGR be sanctioned, in favor of JBR, for bad faith and frivolous use of this Court's process.

Sanctions by reviewing Courts are authorized by Code of Civil Procedure, Section 907 (making CCP Section 128.5-type sanctions available in reviewing Courts) and 1109 (making Section 907 sanctions and damages applicable to original proceedings in review Courts, e.g. Motions, Petitions, etc.). See also **Coast Savings vs. Black**, 187 CA3d 1494, 1495, and fn. 1 on p. 1495.

The amounts of suggested sanctions, damages against AGR in favor of JBR, and grounds or reasons for the amounts, are discussed at the Conclusion of this Memorandum of Points and Authorities, and at the Conclusion of the Supporting Declaration which follows this Memo.

II

REGARDIE IS CONTRACTUALLY, ETHICALLY, LEGALLY AND MORALLY OBLIGATED NOT TO WITHDRAW; THUS HIS NON-DESIRABLE WITHDRAWAL SHOULD BE PERMITTED ON CONDITIONS AND WITH SANCTIONS IMPOSED ON HIM BY THIS COURT

1. The letter Retainer Agreement dated 5/18/89, EXH. "A" attached, drafted by Regardie, specifically obligates AGR as "lead counsel" (top of p. 2 Exh. "A"), to perform services which "include preparation for and conduct of trial, writs, and appeals" (p. 2, 2nd. para. of Exh. "A"). (Emphasis added).

Clearly, the post-judgment proceedings fall into the plain meaning of

included services - i.e., "preparation for and conduct of trial, writs, and appeals." Supra.

2. Even if, arguendo, the post-judgment proceedings are not "included services" under the retainer agreement (Exh. "A"), those proceedings, and matters incident, were the subject of an oral agreement made by and between Regardie and Rosenthal to the effect that Regardie, Klein (and Rendelman or his replacement) would render the services. That oral agreement was executed, affirmed and ratified as to him by Regardie's conduct; he rendered these ratifying services, among others:

> -Appeared **March 5, 1991** before Hon. Stephen E. O'Neil, Superior Court, Dept. 82, re three post-judgment matters, including OSC re Contempt, Commissioner Taylor's.....ordering "Mr. Rosenthal to answer...questions." (RT 3/5/91, p. 11, l. 20-23).

-Wrote his April 11, 1991 letter to J. Ford, Esq. "strongly suggesting" that Ford file "an immediate appeal on behalf of Travelers Insurance Company from the denial of claim of exemption interposed by (Mr. Ford for his client) Travelers on behalf of Mr. Rosenthal, ".....denial took place in Department 85 on March 28, 1991....." a matter of prime importance to Mr. Rosenthal."

-Appeared April 24, 1991 before Hon. Ronald M. Sohigian, Judge Superior Court Dept. 85 re two post-judgment motions (1) for permission to file a late claim of exemption "essentially", and (2) re "continued receivership proceedings." (RT 1:21-25).

-Prepared, signed and filed "APPELLANT'S OPPOSITION May 21, 1991 TO RENEWED APPLICATION FOR SANCTIONS"

in CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, together with Regardie's letter to Clerk, Division Five, Court of Appeal, re correction(s) in APPELLANT'S OPPOSITION.

3. Regardie is bound to honor his contractual, ethical, legal and moral obligations (supra) to his client Rosenthal.

California Business and Professions Code, Section 6068, and subsections referred to below provide, in pertinent part, that "It is the duty of the attorney to do all of the following":

> (d) To employ, for the purpose of maintaining the causes confided to him.....such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by any artifice or false statement of fact or law.

The very bringing (filing) of Regardie's motion "to withdraw" is a blatant misuse of the Court's process (**Hersch vs. Citzlis**, 146 CA3d 1001) and in plain violation of sub-section (d); the details of some of Regardie's bad faith conduct and purpose are set forth in the (following) declaration. His Motion is the last step in his obvious plan and ploy to avoid his responsibilities without the slightest discernable regard for the consequent devastation of his client JBR.

> (h) Never to reject, for any consideration personal to himself...., the cause of the defenseless or the oppressed.

Here, Regardie's performance of services was so substandard and incompetent (examples in following declaration) that they resulted in an unthinkably adverse decision in the underlying "main case". Thus by sheer gross negligence and incompetence, Regardie caused Rosenthal to lose his lifetime practice

accumulations including rights to a fee, and ultimately the fee itself (accrued gross value, about $4 million), and to lose his actual liberty (in jail since April 8, 1991). Also as a direct result of more Regardie incompetence and negligence, Regardie reached a new pinnacle, an all-time record for outrageous conduct - a scheme, plan and design by which Regardie seeks to abdicate any semblance of responsibility. Instead of protecting "the cause of the defenseless or the oppressed" (supra), Regardie seeks to further visit and visit unconscionable destruction on Rosenthal and thus contribute to his defenselessness and oppression. Regardie has fabricated and contrived a plan to deceive the Court(s) and to throw Rosenthal to the wolves - all for Regardie's own "consideration personal to himself." (Again, for factual details, please see following declaration.)

Rule 6-101(A)(2) of the State Bar

Rules of Professional Conduct requires an attorney to perform the services for which he is hired because the failure to do so can be an intentional or reckless failure to perform competently, which is also a violation of the rule. Baker v State Bar (1989) 49 C.3d 804, 816-817, fn. 5. Similarly, Rule 2-111(A)(2) provides that an attorney shall not withdraw until he has taken steps to avoid foreseeable prejudice to the rights of the client. Baker, supra.

Regardie has clearly contravened, and is contravening (if not defying) both rules. (See following declaration.)

III

REGARDIE'S STATED REASON FOR WITHDRAWAL [BREAKDOWN OF COMMUNICATIONS] ("BETWEEN JBR & AGR") LOGICALLY APPLIED IN SUPERIOR COURT, AND HERE APPLIES TO ANY FURTHER REPRESENTATION; YET HE APPARENTLY (NOT CLEAR) WANTS TO CONTINUE SOME REPRESENTATION. THE

"BREAKDOWN", IF TRUE, WAS UNILATERALLY CONTRIVED BY REGARDIE TO AVOID HIS OBLIGATIONS TO ROSENTHAL. THERE WAS AND IS NO "BREAKDOWN...BETWEEN" US. "BREAKDOWN" IS ONLY REGARDIE'S.

[AGR'S "MOTION...TO WITHDRAW" filed in Superior Court earlier (heard August 6, 1991) is virtually identical to his instant Motion here. Reference is made here (in this RESPONSE, which is also virtually identical to Response "Opposition" in Superior Court, although somewhat expanded in scope) for these two dominant reasons: (1) To show that AGR has had more than adequate notice of JBR's request for sanctions, and (2) to afford the Court an opportunity, if it wishes, to consider JBR's contentions that Superior Court had no jurisdiction because no matters there pending, and that all matters were and are pending in this Court.. Estate of Cauzarang (1934) 1 C2d 712, 717. Echlin v Superior Court (1939), 13 C2d 368, 374. Witkin, 1 Cal.

Procedure 3d ATTORNEYS, 887. Wright v Security (1939) 13 C2d 139, 140. See Exhibit G, to this RESPONSE.

1. In his sworn Declaration attached to instant AMENDED MOTION TO WITHDRAW AS ATTORNEY OF RECORD (p/s July 5, 1991). Mr. Regardie says: "I am no longer able to continue my representation of...Rosenthal for the reason that there has been an irreparable breakdown in communications between us, and that **consequently I am no longer able to effectively communicate with him."** (Emphasis added). (Declaration of...Regardie, July 1, 1991, p. 1, l. 5-8). Continuing, the Declaration states ".....it is respectfully requested that the Motion (to withdraw) be granted and that I be relieved as attorney of record for .....Rosenthal."

But, that MOTION TO WITHDRAW states that the Motion is "to withdraw as attorney of record for defendant.....Rosenthal **in all judgment debtor proceedings**." (Motion, p. 1,

l. 23-24) (Emphasis added)

Which? Did (and does) he wish to withdraw from any further representation, including the pending appeal from the judgment in the (main) case? Or only from representation in judgment debtor proceedings?

Obviously and logically, if he is no longer able to continue his representation, he cannot "represent" Rosenthal for any purpose! If he is unable to effectively communicate with Rosenthal....and he seeks to withdraw "as attorney of record" - how can he remain and function as attorney of record for one purpose (pending appeal(s)), and not for other purposes?

In Mr. Mann's PLAINTIFF'S (Judgment Creditor's) RESPONSE TO MOTION TO WITHDRAW, he states: "Finally, it seems odd that the Attorney-Client relationship could have deteriorated to the point where it is impossible for Mr. Regardie to represent Rosenthal in the judgment debtor proceedings,

but such relationship continues to be pleasant enough to permit Mr. Regardie to prosecute the appeal." [PLAINTIFF'S RESPONSE TO REGARDIE SUPERIOR COURT MOTION..." p. 3, l. 14-18].

2. There has not been a breakdown in communications "between us". It simply isn't true, Regardie's Declaration notwithstanding:

(a) **No breakdown**. Regardie continues to communicate when it suits his devious purpose of the moment. As recently as July 3, 1991, (See Exh. "B" attached), he replies to a Rosenthal communication (faxed memo 7/2/91) to him.

(b) **"Breakdown" idea and label are the unilateral and misleading contrivance of Regardie**. His declaration (replete with conclusions and opinions, and virtually devoid of **any** statements of fact) contain no statement of facts as to how the "breakdown" came about. The "breakdown" is not one "between us"; it, sometimes, when convenient to him refers only to Regardie - not "between

us"; "us" means, of course, Regardie and Rosenthal. Regardie unilaterally decided that he wouldn't communicate - and that he'd ignore Rosenthal's communications except when he (Regardie) chose to respond. (Exhibits "B" and "E"). For factual account of jail conference (AGR and JBR), please see attached Rosenthal declaration).

3. No stipulation (written) no jurisdiction, i.e. non-waivable jurisdictional infirmity. A nonconsensual (written, memorialized) order of general reference to a referee or commissioner, violates constitutional (Cal. Constitution VI, Section 22, 23), statutory (C.C.P. 259, 638, 639, 1211) and controlling decisional, International Ski Boat v Superior Court [1991] 91 Daily Journal, D.A.R. 8442, July 16, 1991 issue; In re Cowan, [1991] 91 Daily Journal D.A.R. 6383, June 4, 1991 issue; Aetna Life Insurance v Superior Court (1986) 182 CA3d 431, 436; 227 Cal.Rptr. 460, 463. The

principles and authorities therefor are included here because the subject matters were discussed in the May 91 jailhouse meeting between Regardie and Rosenthal; (attached Declaration), at which Regardie contends the "irreparable breakdown of communications between us" took place.

IV

REGARDIE'S MOTION TO WITHDRAW IS FRIVOLOUS AND FAILED JUSTIFYING AND IMPELLING IMPOSITION OF SANCTIONS AGAINST HIM, IN FAVOR OF ROSENTHAL.

CODE OF CIVIL PROCEDURE SECTIONS 128.5 (TRIAL COURT), 907 and 1109 (REVIEWING COURTS, APPEALS AND ORIGINAL PROCEEDINGS)

(Please See Section I of this Memo of P & A, supra)

1. AGR's declaration(s) state no facts upon which his pervasive conclusions are based. Without belaboring the obvious, those conclusions should be stricken and disregarded by the Court.

2. The Motion is frivolous and in

bad faith:

(a) No facts are stated by AGR- as to **why** he should be "permitted to withdraw; (his Attorney- Client "privilege" excuse is neither pertinent nor availing);

(b) The circumstances and situation to which the motion (apparently) relates (circumstances and situation further elucidated and supported by these (JBR) Opposition papers and exhibits) and by Plaintiff's Response...", p. 3, l. 14-16, are the total and unilateral creations of AGR himself. Thus, by his own bootstraps, he seeks to be somehow relieved of his manifold and indisputable obligations and duties owed to this Court and to his client

JBR.

(c) Those duties are contractual and ethical under the provisions of the STATE BAR ACT and opinions of the California Supreme Court, including California Business and Professions Code, Section 6068.

(d) AGR's "positions" are offensive to this Court, the judicial system, and to simple rationality and common sense; they must not be condoned and certainly not endorsed or approved by this Court, implicitly or expressly. To avoid any appearance of such condonation, endorsement or approval, the imposition of sanctions against AGR, in favor of JBR, is extraordinarily necessary (to "deter others")

even if, as a practical matter, the Court sees a need to (provisionally and conditionally) grant the motion, wholly or partially. (see infra.)

V

CONCLUSION, AND RELIEF REQUESTED

1. If the Court determines that the Motion should be granted, (a) the proceeding Motion should be continued by this Court's Order (to Mr. Regardie) to show cause (to an expeditiously early date) why Regardie should not be required to perform conditions and pay sanctions as may be imposed, or (b) the Court's order granting (not continuing) should require Regardie to pay sanctions and perform conditions (below).

2. Conditions and Sanctions, respectively (requested to be performed and paid by Regardie, at his expense)

(A). Conditions.

(1) Send to Rosenthal original or proper copies of all "papers" (all inclusive, intended) both received or generated by Regardie or Klein (except those provably previously sent to Rosenthal).

(2) Prepare, and send to Rosenthal, a detailed written report of all oral communications to, and those stated by Regardie and Klein or either of them, in connection with pre-trial, trial and post-trial periods, except those previously and provably reported to Rosenthal.

(3) Send to Rosenthal a fully detailed, completely <u>legible</u> accounting by AGR of use of funds entrusted (trust account) to AGR by JBR. The "accounting"

should explain, with specific reference and detail, and trace the supporting documents (receipts, invoices, etc.) and references to check numbers, to specific entries in AGR trust account ledger to be supplied by AGR to JBR (except to extent previously supplied), in legible, intelligible form.

(4) Reply with dispatch and in writing to all of JBR's written requests to AGR, for information and documents related to this case concerning or occurring in pre-trial, trial and post-trial periods.

(5) File in California Supreme Court, with appropriate explanation, their REPLY BRIEF prepared by AGR, EJK (Exh. F) but not filed because Supreme

Court denied Petition (and stay) April 18, 1991, i.e. did not wait for inexcusably delayed REPLY BRIEF.

NOTE: A. If Regardie believes information or papers referred to above are truly or possibly Attorney Client confidential and thus privileged, he must first so inform JBR in writing. If privilege not waived by JBR in writing to AGR, or agreed by AGR-JBR to be inapplicable, application should be made to this Court for disposition.

B. All written communications (and amounts to be paid to JBR as sanctions, under (B) and/or (C) below) are to be brought by AGR or EJK or other State Bar member on behalf of JBR to Attorney Conference Room area, at Los Angeles County Central

Jail - for as long as JBR is there; or AGR is notified otherwise in writing by JBR.

(B). **Sanctions**. (See "Conclusion" of JBR Declaration).

1. AGR to pay to JBR, on dates ordered by this Court), plus interest at 7% per annum from date(s) stated in (a) - (d), incl. immediately below;

-(a) August 19, 1991- $37,500.00 for Travelers annuity payments paid to/for Conrad, up to August 6, 1991, and $12,500 for each quarter (November 1, February 1, May 1, August 1) thereafter;

-(b) September 3, 1991 - If AGR withdraws from "underlying appeal" (from judgment by Hon. Ronald

Cappai, Judge, this Court), $30,000 for defraying new attorney fees in re that appeal (those appeals).

-(c) September 3, 1991- $30,000 if AGR withdraws from appeals of, from post-judgment matters, including appeals, writs, petitions, motions, for defraying new attorney fees or concerning those appeals, and interim matters.

-(d) September 17, 1991- for each day of JBR incarceration, commencing April 18, 1991, $500.00.

(C) **Other, Additional Conditions, Sanctions, Relief**.

In lieu of or in addition to the **Conditions** and

Sanctions stated above, such other amounts for such purposes as this Court may determine to be due therefor, by AGR to JBR.

(D) Amounts ordered to be paid by AGR to JBR as Sanctions under (B) and (C) above are not to be reached or reachable by levy, execution, garnishment or otherwise by or for CONRAD or GREEN, and are to be deemed to be exempt as living and related expenses.

Respectfully submitted.

DATED: September 7, 1991.

JEROME B. ROSENTHAL
In Pro Per, Re and Related To This Motion

DECLARATION FOLLOWS

DECLARATION OF JEROME B. ROSENTHAL

I, JEROME B. ROSENTHAL, declare:

1. The retainer agreement (Exh. "A") was drafted by Regardie (AGR), and signed by him, by Edwin J. Klein, Jr., (EJK) and by me (JBR) on June 2, 1989, in my office.

2. In two discussions with AGR before June 2, 1989, I told him that I wanted and needed an arrangement under which he, as lead counsel, along with a co-counsel, and a research assistant would serve and represent me in all matters in the **Conrad, Green vs/adv Rosenthal** case. AGR stated that plan was acceptable to him and that he would prepare an agreement that would embody the "all services" idea. His preparation of Exhibit "A" followed, as did its execution.

3. In the pre-June 2nd discussions with AGR, I told him that the contingent percentage retainer fee proposed was intended to include the "all services" concept. He said he agreed.

4. After the end of the Conrad, Green vs/adv. Rosenthal trial, on at least three occasions, AGR told me that he intended the "all services" concept in the retainer agreement to include post judgment proceedings, matters, and post-judgment debtor proceedings, matters and that he may not have specified (in drafting Exh. "A") post-judgment matters because he never even imagined that Conrad, Green could or would prevail and procure a judgment against me. AGR said that at any rate, he, Klein and Rendelman would continue to serve so as to include the post-judgment and post-judgment-debtor matters, as well as the trial "writs and appeals" which were specifically provided for in the retainer agreement, Exh. "A".

AGR and EJK did render such services, as illustrated in the preceding, attached Points and Authorities, Section II, subsection 2 thereof. The factual statements made therein are true and correct.

5. The incompetent, negligent and substandard services of AGR before and during trial are exemplified by these incidents and circumstances:

(a) He **stipulated** with an attorney for a witness for whom he had issued a trial subpoena that the service of the subpoena was invalid. That stipulation was negotiated and signed by AGR without my knowledge or consent. When I asked him why he had thus excused a "key" witness whose testimony we profoundly needed, he said the service was "not good service." When I asked why, he said (parrot-like) and repeated that the service was "not good" because it was "not good service". Ludicrous! We never did procure that critical, much needed testimony. Regardie never disputed that the testimony was both critical and indispensably necessary.

After that abortive effort to procure the testimony, I (at his request) engaged special investigators to attempt service by constant surveillance and vigil. They failed - and I spent about $5,00C for their efforts; the payments were made directly by me - i.e., not through AGR's trust account. No service!

(b) AGR delegated to EJK the task of arranging for the taking of the deposition (in New York) of another key witness, whose testimony AGR agreed was expected to be extremely helpful if not critically necessary. EJK failed to timely implement the procedure for the deposition - and that witness' testimony was also lost. AGR later (after trial) explained that once he even as "lead counsel" delegated a task or assignment to EJK (co-counsel), AGR

had no responsibility to supervise, or even to monitor, to make certain that the task was performed. AGR restated that notion on many occasions (at least three), one of which was at the jail-house meeting with me - (May 1991), the same meeting at which AGR says I "insulted" him, and thus the "breakdown of communications between us" took place.

(c) Not later than one month after June 2, 1989, AGR assigned to EJK the task of applying for an appropriate extraordinary writ to reverse and preclude the crucially detrimental effect of a pre-trial summary adjudication of an issue; EJK accepted the assignment in my presence. The task was <u>never</u> performed; EJK later said he "never got around to it"; and AGR again

stated that he was not obliged to, nor did he, monitor or supervise the once-delegated task.

6. AGR "assigned" to EJK the most-significant post-trial undertaking, i.e. to seek review and relief (in Court of Appeals and in California Supreme Court) from Hon. Stephen O'Neil's order(s) holding me in contempt and incarcerating me. In his "Opposition of R.P.I. (Conrad) to AGR, EJK Habeas Corpus/Certiorari Petition to California Supreme Court" Robert Mann (Conrad counsel) stated "Rosenthal stipulated to such judicial officer (Commissioner Taylor) hearing the matter on not one but two occasions....". (Opposition, dated April 8, 1991, p. 3, para. 3). April 8, 1991 is the same day as that upon which Judge O'Neil sent me, JBR, to jail - where I am at this writing.

Mann's statement is a flat untruth. I (Rosenthal) never did so stipulate, and neither did my counsel.

AGR and EJK prepared a Reply to Mann's "OPPOSITION." But because AGR delayed in forwarding the Opposition to EJK (AGR sent it on the third day after he received it), and because EJK delayed until April 18, before the Reply was filed by AGR/EJK, THE REPLY WAS **NEVER** FILED! Not to this day. Please see Exhibits C, D, and F. The Supreme Court did not (and does not yet) know that Mann's statement (that Rosenthal stipulated to Commissioner Taylor's acting as judge) was an out-and-out falsehood! _ Moreover, Regardie refused to file in the Supreme Court the Reply "late", with an explanation, and refused to write to the Supreme Court to advise of Mann's deceit in misleading that Court. So that not only was the Supreme Court misled (by Regardie and Klein negligent and incompetent acts), but so was Judge Stephen E. O'Neil, Superior Court Judge who literally was misled into thinking that the Supreme Court denied relief and, in some manner, approved (tacitly) his contempt

and incarceration orders, and his order denying the Regardie, Klein Motion for Reconsideration. That order was entered May 20, 1991 (Minute Order), Exh. H hereto.

What action would Judge O'Neil have taken if he knew that the Supreme Court had been misled by the deceit of Mann and the negligent delay of Regardie, Klein? In reflecting on that question, it should be borne in mind that Judge O'Neil (I contend) had no jurisdiction (if, as I contend, Commissioner Taylor's orders (<u>if</u>, he made any, were **<u>void</u>** for want of jurisdiction. The authorities are clear, in support of my contentions, i.e. no stipulation, no jurisdiction, hence Taylor order(s), <u>if</u> any made, are void. Further, Judge O'Neil has/had no jurisdiction to enforce such order(s). The jurisdictional defect is nonwaivable. See P & A, Section II, paras. 2 and 3.

7. For the first time since my incarceration (April 8), AGR visited and

conferred with me at the L.A. County Jail in early May, some four weeks or so after I was locked-up.

In his Superior Court DECLARATION (in support of WITHDRAWAL MOTION), Regardie says he is "precluded by the attorney-client privilege from revealing the details of the communications between us in this regard (Decl. p. 1:9, 10) i.e., "an irreparable breakdown in the communications between us." (Id. 1:8, 9). He is not thus precluded! The pertinent portions of our talk during that (the only) Regardie visit at the jail were not at all "confidential" in nature. His "privilege claim" is in bad faith, spurious and misleading; it becomes apparent that (it is not his privilege - it is mine) he is eager to cloak his negligence and refusal to rectify by the inapposite use of the attorney-client privilege, impermissibly urged by him.

On that occasion, I asked him why he had delayed the filing of our REPLY to

Conrad/Mann's Opposition to our Emergency Petition and Request for Stay (in California Supreme Court); (please see Para. 6 - **supra**), and why he, as lead counsel, did not see to it that Ed Klein as Associate Counsel filed the Reply on time (so as to point out Mann's deception, and the jurisdictional nature of "STIPULATION" as indispensable requirement.

AGR'S REPLIES:

(1) He sent the (Mann's) OPPOSITION to EJK for the preparation and filing of our REPLY (in California Supreme Court) as soon as "he could get around to it: without saying (he refused to say) why he couldn't and didn't sooner "get around to it" - any sooner than the third day;

(2) He was aware of the emergency nature of the matter before the Supreme Court (my own liberty), but that became "EJK's problem exclusively when and after he (AGR) had "assigned"/delegated the task to EJK", and that he, AGR as "lead counsel" was relieved of

any responsibility, such as the duty to supervise or monitor his associate's (EKJ's) performance.

(3) (To my renewed request) he said that he would not in any way inform The Supreme Court, and others through it, of his and EJK's delay as the cause for the High Court's denial (Exhibit "D") of the Emergency Petition, so that our "Reply" was <u>never</u> filed. The Supreme Court was thus led to believe Mann's statement that we (JBR, AGR, EJK) had "stipulated" (a total falsity); that he would not himself inform or explain to the Supreme Court, and would neither instruct nor permit EJK to do so. To this day, neither he nor EJK has ever informed the Supreme Court that their own unexplained and inexcusable delay in filing (actually, <u>never</u> filing) a REPLY to R.P.I. Conrad's "OPPOSITION" (by Mr. Mann of Fierstein & Sturman, Conrad's attorneys) to HABEAS CORPUS/CERTIORARI Petition for Review of Contempt Orders of JBR.

(4) When I, (needlessly) observed that my very liberty was lost and my incarceration continued indefinitely, and asked him to reconsider his abject refusal to rectify the consequences of his (and EJK's) actions and omissions by frank disclosures to Supreme, appellate and trial court(s), AGR said he would not agree to reconsider, he would let me know if and whether he "changed his mind". (I have never heard from him in that respect.)

In response, I told AGR that I did not concur with or accept his replies, that I considered his positions as stated (in this para. 7, and in para. 5(a), (b) and (c) above) as being in shameful dereliction of his legal and ethical duties (owed to the Courts and to me as his client), especially as "lead counsel." He replied that he was **insulted** by my statements - ! I responded that his thick-or-thin skinned imperviousness or susceptibility, respectively to totally true

description of his acts and omissions was hardly if at all germane or relevant. He repeated that he felt "insulted."

Further, during that Jail House Conference (week ending May 11, 1991), interspersed between AGR's and my statements and replies referred to above, AGR and I stated as follows (in accurate gest, substance and effect) before AGR for the last time, repeated, end-line that he "felt insulted":

That before he and I agreed that AGR would represent JBR in the underlying (main) case, i.e. CONRAD, GREEN vs/adv JBR, I asked AGR whether he had full and sufficient resources necessary to proper representation of me. He said unequivocally that he did have, that his practice resources included a full-time competent legal secretary, an adequate library, and "plenty of" his own time available.

In response to my statement that "we make absolutely sure" of the adequacy he should

recruit and determine suitability of "associate attorney" and of "research attorney". He said he agreed, that he would do so, and would retain those thus-supplemented resources until the case was finally, completely "put to bed." To my request that he act as "lead counsel" and be sure to supervise and monitor the other two attorneys, he replied that he certainly would do that "throughout that time", and accept full responsibility "as lead counsel" for the work of the other two men.

That he had, before the June 2, 1989 signing of the retainer agreement, recruited and qualified EJK and James Rendelman, respectively, as the two additional attorneys.

That when I had asked about EJK qualifications, he had said "Exceptionally good - and enthusiastic about and with more than enough available time to "see the matter through to conclusion", but that he had later expressed extreme displeasure about EJK's

having accepted (during pending of "our case") an employment which imposed upon him a caseload of 68 cases - instead of or added to the five or so cases he carried when he "signed on". At that juncture, he had stated that he (AGR) would more closely watch, monitor and supervise EJK's work on "our cases" and not delegate or assign any or more tasks to EJK than EJK could responsibly handle.

That up to the advent of the May 1991 meeting with me at the jail, he had repudiated all of his pertinent agreements, promises, and representations to me (above), and that by his own admissions, those "representations" had been transformed into culpable misrepresentations. When I told him that he should then (May 1991) rectify the deplorable situation he had caused, he answered that he "felt insulted." When I asked him if he denied these misdeeds or omissions [e.g. failure to supervise, monitor and control the

two attorneys; failure to use the "full-time legal secretary - using her only "part-time" so that when needed she was not immediately available for time-sensitive work that must be done; failure to rectify or even attempt to rectify - the egregious and dangerous reductions in EJK's "availability"; stated unwillingness and failure to inform the Supreme Court of the fact that there was no stipulation that Commissioner Taylor could act as Judge Pro Tem, with the end result that I was found in contempt and contained in jail - confinement, readily avoidable or terminable if Courts were advised of the truth (no stipulation, no jurisdiction), etc. AGR replied that he did not deny what I had said, but that he was or "felt" insulted.

When I asked him if the truth "insulted him", especially if its recanting was for the purpose of his making necessary amends and taking necessary rectification and ameliorating steps, he said that I did

"insult" him.

When I pointed out to him that his delegating and assigning tasks to EJK that EJK could not or did not timely perform, perform adequately, or not perform at all, were (also) unethical, illegal, and insufferably immoral breaches and abdications of his duties and agreed obligations, he said that although those characterizations of his conduct were not untruthful, he again was and/or "felt insulted."

Finally, when I asked him if he thought that his feeling "insulted" was more important than his honoring his obligations, he retorted that his feeling of "insult" was the more important! On that note when I asked him if he thought that under the circumstances, he justifiably "turned over to unavailable Ed (EJK) the task of procuring my release - or at least of fully advising all courts concerned of the fundamental infirmities (including "no jurisdiction") contempt and incarceration

order, while he (AGR) did not "lift a finger" to undo the destruction and harm he had caused- or to which he was the major "contributor", his non-sequitur reply was, again, that he felt "insulted."

[AGR did not appear at that May 20, 1991 hearing on Motion before Honorable Stephen E. O'Neil, Judge for reconsideration of the March 5 Order of Contempt and Commitment. He left it to (the reduced-capacity) "Ed", while AGR went on vacation (to about June 10), and **while I remained (and still now remain) in jail**.]

Although the portion immediately above accurately reflects the "jail meeting", it is not complete. Not only were there more AGR "transgressions" discussed then and there, there are also more "transgressions" of/by AGR not so discussed, not the least of which is AGR's bringing of his withdrawal motions before this Court and, earlier, before the Superior Court.

I make this Declaration **not** to resist the

Court's granting of withdrawal motion, but rather to support my requests for the imposition of conditions and of sanctions.

CONCLUSION

8. For years Travelers Life Insurance Company has paid to me $12,500 quarter-annually under an annuity policy (agreement) of which I am non-party designated beneficiary. Since **Conrad, Green** judgment herein, three such payments (totalling $37,500) have been paid to, for Conrad, and not to me. Policy contains "spendthrift" provisions. Regardie and Klein have each stated to me that they would take appropriate steps to judicially prevent such continued taking and to recover past taking, i.e. $7,500.00. Neither AGR nor EJK has made any such effort, in suit or otherwise.

9. If Regardie withdraws from "underlying appeals" i.e. from Hon. Ronald Cappai, Judge, Superior Court Judgment, this matter, the cost of his replacement (new

attorney fees) will equal or exceed $25,000, conservatively estimated.

10. If Regardie "withdraws from" two additional appeals, (i.e. re disallowance of exemptions, and the contempt and incarceration (both "post-judgment matters"), the cost of his replacement (new attorney fees) will equal or exceed $30,000 - conservatively estimated, including possible need to resort to federal, as well as state systems.

11. I have been incarcerated (for contempt) since April 8, 1991, some 150 days (approximate, minimum), without any interruption. To deter others from the outrageous, bad faith conduct like that of Regardie, as well as to partially compensate me for losses of income and for business expenses attributable directly from the acts and omissions of Regardie as stated and referred to in this Response, P & A, and Declaration, I request (see P & A, Section V, "CONCLUSION AND RELIEF REQUESTED" at end of P

& A) as Sanctions, that AGR pay to me $500.00 for each day of my incarceration, commencing (not from its April 8 beginning) but commencing April 18, 1991. That is the day upon which the California Supreme Court denied review, i.e. my petition and request for stay (emergency), Exh. "D" without ever seeing Regardie/Klein prepared "REPLY....", dated April 18, 1991, but never filed - AGR (EJK) refused to later file - although their delay in preparation prevented timely filing (i.e. before High Court Order). (This omission, negligence and continuing refusal or inaction by Regardie - is more fully explained above, and in P & A).

12. I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California on September 7, 1991.

JEROME B. ROSENTHAL
Declarant

EXHIBITS A - H (INCL.) FOLLOW

EXHIBIT A TO APPENDIX F

Warner Center
5850 Canoga Ave.
Woodland Hills, CA
91367
(818) 704-7400

May 18, 1989

Mr. Jerome B. Rosenthal
6535 Wilshire Boulevard
Los Angeles, CA 90048

Re: Retainer Agreement
Conrad, et al. v Rosenthal and Related
Cross-Actions

Dear Jerry:

This confirms our agreement regarding our repres.ntation of you in the following Superior Court actions, [herein sometimes "Conrad, Green matters] now pending in L.A. Superior Court: Nos. 545 108, C 476 121, and C 480 712 (hereafter, "the case.")

You will advance all costs and out of pocket expenses in connection with the Conrad, Green matters, by your remittance to Arnold G. Regardie's Client's Trust Account, at his request. An accounting for all trust account disbursements will be provided to you, either at the end of the trial or settlement of the

case or before, at your request. All costs and expenses are to be paid by you as they are incurred. If, for any reason, we are called upon to advance any costs or expenses, you agree to immediately reimburse us for the same on demand. The costs and expenses include, but are not limited to any future monetary fees imposed against you and your attorneys of record, expert witness fees, costs and expenses, messenger costs, reproduction costs, filing fees, court reporter fees (deposition, trial and hearing transcripts), process serving fees, jury fees and deposits, investigation expenses paid or incurred to outside investigators, bond premiums, out of L.A. County travel and transportation expenses, long distance telephone charges, any other costs of suit not specified above and in addition those costs defined by C.C.P. Section 1033.5.

We agree to represent you as your attorneys in the Conrad, Green matter, both in your capacity as a defendant and as a cross-complainant, and to fully cooperate with each other in representing you in this regard. Arnold G. Regardie is to be lead counsel and Edwin J. Klein is to be associate counsel.

Our services covered by the contingent fee in the Conrad, Green matter include preparation for and conduct of trial, writs and appeals. The particular aspects to be initiated and finished as soon as practicable, on a priority basis, include:

-Initiating new discovery, and completing any unfinished discovery;
-Responding to the discovery by Conrad and/or Green;

-Interviewing, by us, or by outside investigator(s), of witnesses designated by you; taking their depositions, when necessary;

-Amending and/or supplementing cross-complaint; and

-Preparing and prosecuting motions incident to or in aid of the foregoing items listed immediately above.

We will handle the Conrad, Green matters on a contingent fee basis, with our fee being a percentage of the gross amount recovered on your behalf, according to the following formula:

1. Out of the first million dollars recovered on your behalf, our fee will be an

amount equal to 30% with an additional 5% for the research assistant.

2. Out of the second million dollars recovered on your behalf, our fee will be an amount equal to 35%, with an additional 5% for the research assistant.

3. Out of any sums in excess of two million dollars recovered on your behalf, our fee will be an amount equal to 40%; with an additional 5% for the research assistant.

It has been agreed that the foregoing fee is to be divided 66 2/3 to Regardie and 33 1/3 to Klein, applicable to the "gross amount recovered", as explained below. Gross amount received means without deduction for any amounts, whether for predecessor attorneys, costs, fees, and out of pocket expenses incurred or paid for by Jerome B. Rosenthal in connection with the case, except as hereafter

provided; gross amount received shall be reduced by no more than $40,000 for costs of suit incurred by you. For purposes of this $40,000, the costs are defined in paragraph 2, page 1 of the agreement.

The above percentages apply to the amount(s) hereafter recovered by you in the Conrad, Green matters. You have told us that the Heinzes paid you $700,000 (gross, less some $250,000 attached or in dispute, and less other amounts), that the $700,000 is not part of the approximately three million "stake" held by City National Bank, and that Conrad, Green, et al may claim all or part of the $700,000 (or net amount you derived therefrom). We will defend you in resisting their claims, but neither we nor the assistant is to be paid for that/those services, since the percentages applied to the other amounts

recovered on your behalf (as particularized) are intended to cover services rendered in resisting/defending against those claims concerning the $700,000. It is our understanding that the claims of Conrad and Green to the $700,000 are embodied in a supplemental complaint.

In addition, we have engaged an assistant, whose name is James D. Rendleman. He is an attorney licensed to practice in California, and has agreed to help us in the Conrad, Green matters. Our choice of the assistant is subject to your approval, which you orally have given us. The idea of the assistant was suggested by you and accepted by us in view of the voluminousness of files and papers, and the complexity and importance of the Conrad, Green matters.

However, the decision to employ or not such a research assistant shall be ours alone, and if we elect to discontinue the use of said assistant, the 5% of the fee otherwise payable for said assistant shall belong to us instead, subject to our being responsible for any amount due to the research assistant. We hereby agree to indemnify and hold you harmless from any claims of said assistant, provided that we or the assistant receive the above-mentioned 5% fee.

We are granted a lien on the proceeds of any monies recovered on your behalf, whether by way of settlement or judgment, to the extent of our contingent fee, as set forth above, and any costs and/or expenses we may have advanced which are unreimbursed by you at the time said moneys are recovered. Our assistant will have a lien on any such moneys to the extent of his

contingent fee as set forth above. You agree to execute, at the time this agreement is signed, a UCC-1 reflecting the lien of Arnold G. Regardie, Edwin J. Klein, Jr. and James D. Rendleman as described herein.

In connection with the Conrad, Green matters, you have represented to us that there is on deposit in a branch of City National Bank, in a certain trust account, which is specifically intended to pay the winner of said litigation; you represent and warrant that the amount now on deposit in said account is in the approximate amount of $3,000,000 (three million dollars).

We understand that you were previously represented in the Conrad, Green matters by attorney Bruce A. Friedman, and other attorneys. We will defend you without charge

if either Bruce A. Friedman, David Frank, Geoffrey Pope and/or Anne Koza (but not Richard Agay) files a Superior Court action against you claiming attorneys fees arising out of their involvement in the above-referenced litigation.

You acknowledge that we have made no guarantee as to the outcome or the amounts recoverable in connection with this litigation. Our comments about the outcome of your matter are expressions of our opinion only.

You acknowledge that you have been advised by us and are aware that contingency fee arrangements are not set by law, and that a contingency fee between attorney and client is negotiable.

You agree to fully reveal all facts concerning the case to us, to cooperate with us, to keep us informed of developments, and to keep us advised of your address, telephone number and whereabouts.

No settlement in this matter will be made without your written consent, which you agree shall not be unreasonably withheld.

Finally, we agree that if any dispute arises as a result of this agreement, or the performance of either of us pursuant hereto, said dispute will be submitted to binding arbitration before an arbitrator of the L.A. County Bar Association. The arbitrator's decision shall be binding, final, and may be entered as a judgment in a court of competent jurisdiction, and no other proceedings, in court or otherwise, shall be brought to

resolve such a dispute, except as provided by law. The prevailing party in said arbitration shall be entitled to attorneys' fees and costs.

This agreement shall be and is binding on and shall inure to the benefit of the parties hereto and their respective heirs, assigns, personal representatives (which includes executors and administrators) and successors in interest.

If this letter is acceptable to you and is in accordance with your understanding of our agreement, please sign below in the space indicated.

We look forward to a cordial and profitable relationship between us.

Sincerely,

/s/ Arnold G. Regardie-/s/ Edwin J. Klein,Jr.

I have read, understand and agree to all the terms and conditions set forth in this letter.

Dated: /s/ Jerome B. Rosenthal

EXHIBIT B TO APPENDIX F

MEMORANDUM

TO: JEROME B. ROSENTHAL

FROM: ARNOLD G. REGARDIE

DATE: July 3, 1991

Regarding your faxed memorandum dated, July 2, 1991, you are advised to specify which items concerning the trust account you question. You are further advised that every penny in the trust account was spent for CONRAD VS. ROSENTHAL, as you well know. I greatly resent your accusations of misappropriation. You have had the opportunity in the past to review the ledger sheets concerning the trust account, have reviewed them, and have never questioned anything other than the expenditure for a special typist to type your post trial motions. This money was reimbursed to the account to accommodate you, although it is clearly in my opinion a proper expenditure and within the purview of the retainer agreement. In any event, specify which items you believe require further explanation and/or

you believe require further explanation and/or documentation and it will be furnished.

Next, Ed Klein is continuing the representation of you concerning whatever matters he/you believe require representation. Upon the occasion of our last conversation at the county jail, you were clearly advised by me that I would not continue to represent you. You know the reasons why.

Last, until you reimburse me for outstanding bills, regarding messenger, fax and xerox, as indicated in the memorandum sent to you with the trust fund accounting, (at least approximately $500.00) you are requested not to fax any further documents to my office, because faxes cost money. Bonnie may either messenger them at her/your expense, or may send them by mail.

EXHIBIT C TO APPENDIX F

May 10, 1991
JBR vs/adv Con., Grn.

MEMO TO AGR AND EJK

FROM JBR

Bonnie told me today that Ed and Arnie are not coming to see me today, per Arnie's telephone conversation with Bonnie.

Bonnie also told me that Arnie asked for my comments regarding two response briefs "in writing." Impossible from here! Reason: As I told Arnie and Ed, I do not have a copy of our Opening Brief. I have no exhibits and no Reporters Transcripts. Also impossible because Bonnie's visits limited to 20 minutes - not enough time to dictate extensive comments I have, all of which were prepared for expected meeting with both of you per Ed's statement 5/8.

If you or either of you expect me (where it is impossible or extremely difficult) to put all comments to you "in writing", please do the

MEMO TO AGR AND EJK

FROM JBR

---

same and also use messenger because mails stay in receiving room unpredictable time, so do messenger-deliver letters, etc.

Bonnie also advised that today Arnie told her orally that O'Neil hearing continued from 5/13 to 5/20. Demand that you immediately have hearing before O'Neil transferred to another judge or set for another court for hearing on 5/13. You have already caused at least one week delay because of your failure to file O'Neil Motion for Reconsideration and relief to be heard on 5/6 or 5/7.

In response to my question as to why not heard sooner than the 13th set for O'Neil, or why O'Neil hearing not possible with order shortening time, Ed reply was (1) overlooked

MEMO TO AGR AND EJK

FROM JBR

---

sooner filing and (2) afraid adopt request for order shortening time for fear that he and Arnie would be sanctioned for not timely filing which would have made unnecessary any shortening of time.

If Arnie wants documents or other things from me, let him come and ask me or let him put request in writing and send to Bonnie who will try to bring to me. Officials will not always let lay persons deliver documents to me but will let attorneys.

Preceding sentence applies at this moment to Arnie's oral request to Bonnie for copy of civil rights suit, and to Arnie's request for copy of complaints in which California Supreme Court Justices were named as defendants, and

MEMO TO AGR AND EJK

FROM JBR

---

any other documents which Arnie and Ed may want in the future.

Bonnie advises that Arnie has orally reported that Appellate Division 5 is now to hear Mann's Motion for Sanctions per Supreme Court direction. If both of you do not file response which includes your accurate statement that Arnie delayed sending Conrad Opposition to our California Supreme Court Petition for at least two days before sending to Ed for action and that Ed delayed another four days before finish filing, all with result that Supreme Court made decision denying Petition and Stay on 4/18, before Ed's Reply of Petitioner to Opposition of Real Party In Interest to Emergency Habeas

MEMO TO AGR AND EJK

FROM JBR

Corpus/Certiorari Petition For Review of Contempt Order could be filed.

Those two delays, plus both of your refusals to file the document late with explanation of your delays, and your subsequent failure to prepare and file appropriate request for reconsideration reporting to court your delays as reason.

If you refuse this or any other request, put it in writing. If Bonnie is not able to deliver to me, she can show me your refusals.

You are both on notice that if you refuse to so inform Supreme Court and properly inform Appellate Court of your delays which caused non-filing in Supreme Court, I will myself

MEMO TO AGR AND EJK

FROM JBR

---

directly inform Supreme Court and Appellate Court.

As I understood Bonnie's report of Arnie's reason why he did not come here per my request, is because I "abused and insulted" him. I find it strange and both ethically and legally improper for Arnie to consider the need to face the consequences of his dereliction, acts and omissions, and to treat a demand that he face those consequences as insults.

Overall, I suggest that Arnie and Ed, Arnie especially, put aside his professed "sensitivity to insults and abuse" and immediately change both of your tactics, and come to jail to visit and fully deal with

MEMO TO AGR AND EJK

FROM JBR

---

various matters and impending possible detriment in efficient cooperative manner. The three of us "can fight with each other" later. Now and immediately we need to cooperate to achieve united efforts and maximize our position in dealing with potential adversities as well as potential victories or benefits.

JBR

JBR:bd

510agr

DICTATED BUT NOT READ

EXHIBIT D TO APPENDIX F

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District, Division Seven,
No. B057140 - SO20361

IN THE SUPREME COURT OF THE STATE OF CALIF.

IN BANK

SUPREME COURT
FILED
APR 18 1991
Robert Wandruff Clerk
DEPUTY

JEROME B. ROSENTHAL, Petitioner

v.

SUPERIOR COURT FOR THE COUNTRY OF LOS ANGELES, Respondent
ROBERT NOLAN CONRAD, Real Party in Interest

Application for stay and petition for review DENIED without prejudice to a renewed application by Real Parties to the Court of Appeal Second Appellate District, Division Seven, for their costs and for sanctions based on the Petition for Writ of Mandate, etc., filed with the Court of Appeal on March 25, 1991, and the Emergency Application for Immediate Stay Order and Emergency Habeas Corpus/Certiorari Petition, Etc., filed with this court on April 8, 1991. (Code of Civ. Proc. section 907; Bus. and Prof. Code section

6068, subd. (d); Cal.Rules of Court, rule 26(a).)

LUCAS
Chief Justice

EXHIBIT E TO APPENDIX F

LAW OFFICES ARNOLD G. REGARDIE
7437 Topanga Canyon Boulevard
Canoga Park, CA 91303
(818) 704-7400

June 25, 1991

Mr. Robert Mann
Fierstein & Sturman
Law Corporation
Suite 1500
1875 Century Park East
Los Angeles, CA 90067

RE: Conrad vs. Rosenthal

Dear Mr. Mann:

This will acknowledge your letter dated, June 19, 1991. The decision to formally withdraw a attorney of record had already been reached before your letter was received, and is in progress. However, until that has been done you are requested to serve Ed Klein with any and all communications concerning the recent appeals because he alone is handling those appeals and not this office.

With regard to your comments concerning the underlying appeal, apparently you did not read appellant's opening and closing briefs. The appeal is eminently meritorious, a conclusion

which the court of appeal, I am confident, will also reach, in conjunction, with your misstatements of the record, as pointed out in the reply brief.

Sincerely,

/s/

Arnold G. Regardie

cc: Mr. Ed Klein, Jr.
Mr. Jerome B. Rosenthal

EXHIBIT F TO APPENDIX F

No. LASC C 545108
Second Appellate District No. B057140
California Supreme Ct. No. S057140

SUPREME COURT OF THE STATE OF CALIFORNIA

JEROME B. ROSENTHAL

Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA OF THE COUNTY OF LOS ANGELES

Respondent

ROBERT NOLAN CONRAD, A LAW CORPORATION; ROBERT NOLAN CONRAD, AN INDIVIDUAL; HARLAND N. GREEN, A PROFESSIONAL CORPORATION

Real Parties in Interest.

REPLY OF PETITIONER TO OPPOSITION OF REAL PARTY IN INTEREST TO EMERGENCY HABEAS CORPUS/CERTIORARI PETITION FOR REVIEW OF CONTEMPT ORDER

ARNOLD G. REGARDIE, ESQ.
ED KLEIN, JR., EQS.
7437 Topanga Canyon
Canoga Park, CA
Attys for Petitioner
JEROME B. ROSENTHAL

TO THE HONORABLE JUSTICES OF THE CALIFORNIA SUPREME COURT, AND TO THE PARTIES HERETO AND THEIR ATTORNEYS OF RECORD;

Petitioner, JEROME B. ROSENTHAL submits his Reply to the Answer ("Opposition") of the Real Party In Interest, ROBERT NOLAN CONRAD, et al.:

MEMORANDUM OF POINTS AND AUTHORITIES

I

THE REAL PARTY IN INTEREST'S OPPOSITION VIOLATES CRC RULE 28 (6)

California Rules of Court Section 28 (6) limits an Answer to a Petition to 25 pages, excluding any evidentiary exhibits that do not exceed 10 pages. Real Party in Interest ROBERT NOLAN CONRAD'S ("Conrad") Answer greatly exceeds this length, and accordingly violates this rule.

Petitioner JEROME B. ROSENTHAL ("Rosenthal") limited the length of his Petition to comply with the rule, and thus is at a disadvantage with respect to his use of

the evidentiary exhibits.

II

PETITIONER DID NOT STIPULATE TO A COMMISSIONER

Conrad falsely contends that counsel for Petitioner stipulated to the judgment debtor hearing before Commissioner Taylor. Yet Conrad produces no evidence of a written stipulation, because there was none. Further, there is no express oral stipulation in the record by Petitioner or his counsel for the Commissioner to hear the matter.

Conrad produces no authority for his position that the submission of Points and Authorities on the availability of the Fifth Amendment constitutes a stipulation, or that the appearance before the commissioner constitutes a waiver. Conrad's argument, therefore, is without legal justification or authority.

Both the California Constitution, Article VI, Section 22, and the Code of Civil

Procedure, Section 259 limit the authority and jurisdiction of a Commissioner. Absent a written consent of an appearing party, the Commissioner's authority and jurisdiction to act are limited to subordinate judicial duties. As held in In re Wren (1957) 48 Cal.2d 159, 163 the disobedience of a void order made in excess of the jurisdiction of the Court does not constitute a contempt. In In Re Robert S (1968 197 Cal.App.3d 1261, the court held that without a valid stipulation, the Court is without jurisdiction and any judgment or order is void.

Mere appearance before the Commissioner does not constitute a waiver. In Nierenberg v Superior Court (1976) 59 Cal.App.3d 611, the commissioner, sitting as a judge pro temore cited a public defender for contempt. The Court of Appeal held that the public defender's agreement to defer adjudication of the contempt until after trial of the underlying action and his request for

continuance of contempt proceedings after trial did not amount to stipulation to the commissioner's authority.

Petitioner's judgment debtor examination was conducted outside the presence of the court commissioner. The only appearances before the Commissioner regarded the issue of the availability of the 5th Amendment privilege. As previously quoted in Petitioner's Petition, page 20, the Commissioner expressly stated that another Court would determine the availability of the privilege.

Accordingly, petitioner did not stipulate by his conduct to have the Commissioner determine the availability of the privilege since the Commissioner was not making that determination.

III

THE TROY STANDARD THAT IN A JUDGMENT DEBTOR PROCEEDING THE DEBTOR CANNOT SHOW THAT HIS FEAR OF INCRIMINATION IS REASONABLE UNLESS

HE CAN SHOW THERE ARE THREATENED OR PENDING CRIMINAL PROCEEDINGS AGAINST HIM IS UNCONSTITUTIONAL

Conrad contends, and the superior court agreed, that unless petitioner could show that a criminal proceedings against him was either pending or threatened, he could not claim the privilege to remain silent at a judgment debtor proceeding, under the holding of Troy v Superior Court, (1986) 186 Cal.App.3d 1006, 231 Cal.Rptr. 108. Commissioner Taylor noted, however, that Troy was distinguishable on its facts since Troy had already been incarcerated and presumably was immune from further prosecution because of the constitutional prohibition against double jeopardy. Such is not the case here.

If Troy is indeed the standard, then petitioner must confess to a crime and hope no later criminal prosecution results, or commit perjury. That could not have been the intent of the 5th Amendment. Rather, as stated in

Zonver v Superior Court 270 Cal.App.2d 613, the witness does not have to demonstrate conclusively that the answers to the questions will make him subject to prosecution or likely conviction. Once the point is reached where "reasonable judicial imagination" can take over, the witness may remain silent.

VI. SANCTIONS SHOULD BE DENIED, OR ALTERNATIVELY AWARDED TO PETITIONER

Conrad contends that the petition is frivolous and solely taken for the purpose of delay.

Mr. Rosenthal is incarcerated, in poor health and advanced age. It is hardly frivolous that he has maintained his right to remain silent. Petitioner faces life imprisonment should he continue to refuse to answer.

Petitioner seeks relief from this court, for which Conrad contends he and his counsel should be sanctioned. As he has done throughout the trial and post-judgment

proceedings, Conrad continues to cite Day v Rosenthal, 170 Cal.App.3d 1125, Rosenthal v State Bar 43 Cal.3d 612, Young v Rosenthal, and other Rosenthal cases in an effort to prejudice the court against him. Conrad has also unsuccessfully sought sanctions in virtually every effort by Rosenthal to assert his rights and claims.

It is Conrad and his counsel's conduct which is abusive in seeking sanctions, and the frequency with which they raise this issue has breached the boundary of good faith. Accordingly, if monetary sanctions are to be granted, it should be against Conrad and his counsel for attempting to bludgeon Rosenthal with sanctions at every turn.

Rosenthal's imprisonment is sanction enough. His assertion of his constitutional right to remain silent and his seeking relief from incarceration is not sanctionable.

Date: April 18, 1991.

ARNOLD G. REGARDIE
ED KLEIN, JR.

EXHIBIT G TO APPENDIX F

*NOTE: To avoid 8-day delay in delivery, pls. (A) mail to both addresses and (B) have attorney or uniformed/ identified court personnel personally deliver to Jerome B. Rosenthal, c/o L.A. County Jail, 441 Bauchet Street, Los Angeles, CA 90012

*Jerome B. Rosenthal
Booking #2502015;
Dorm #7001 .
P. O. Box 80164-
Terminal Annex
L.A., CA 90086-0164
-and-
6535 Wilshire Blvd
Los Angeles, CA 90048

August 8, 1991

BY PERSONAL DELIVERY

Honorable Stephen E. O'Neil, Judge
Los Angeles Superior Court
111 North Hill Street - Department 82
Los Angeles, California 90012

RE: Conrad etc. vs/adv. Rosenthal
LASC No. C 545 108

Dear Judge O'Neil:

These are the citations and pertinent opinion excerpts/summaries I was unable to find during Court (August 6th) hearing on Regardie Motion for Leave to Withdraw.

Your Honor will recall my statement that my inability to locate (without undue consumption of time) the material was due to the extreme disarray of my notes, caused by several

deputy-sheriff searches (understandable rule- no complaint!)

Proper, Exclusive Forum For Change (Substitution) of Attorney(s)

1) Where a cause was pending on appeal in the Supreme Court, that Court is the "proper forum in which to seek substitution." (citing Jacobus v Jacobus, 208 C 562, 563)

Estate of Cavzarang (1934)
1 C2d 712, 717

2) "It is settled law in this state that where a cause is pending [an] on appeal, substitution is to be effected by order of the Appellate Court. (citations). Hence, the

effect of the 1935 Amendment is to impose on the Appellate Courts the burden of determining, **in the first instance**, disputes between attorneys and clients in cases pending on appeal." (Emphasis added)

Echlin v Superior Court (1939) -
13 C2d 368, 374

"Where the cause is pending in an Appellate Court, substitution is governed by Rule 48(b) of the Rules on Appeal, **and the procedure takes place in the Appellate Court**." (Emphasis added)

Witkin, 1 Cal. Procedure 3d, ATTORNEYS,
Section 87, citing

Wright v Security 1st National Bank (infra) and

Estate of Cavzarang (supra).

"As the cause in which the substitution is sought is now pending on appeal in this Court, this is the proper forum in which to seek such relief." (Emphasis added)

Wright v Security 1st National Bank (1939)

13 C2d 139, 140

Your Honor will also recall that it is undisputed that all three matters are now pending in the Court of Appeal, i.e., on appeal from the underlying judgment, and the two post-judgment matters. Hence, as to all three causes, the proper forum for the matter of the change or substitution of attorneys is clearly, if not jurisdictionally, the Court of Appeal.

Accordingly, it is respectfully urged that this (superior) Court should, consistent with the foregoing,

(1) Deny (on specified "other forum" reason) the subject Regardie Motion for Withdrawal Leave,

(2) Refer the Motion to the Court of Appeal for disposition or

(3) Take appropriate action so that the disposition of the Motion is made by the Court of Appeal.

Respectfully submitted,

JEROME B. ROSENTHAL

In Pro Per, re this subject motion

JBR:bd

cc: Robert S. Mann, Esq.

Stephen Horowitz, Esq.

Arnold G. Regardie, Esq.

Edwin J. Klein, Esq.

EXHIBIT H TO APPENDIX F

DEPT. 82

SUPERIOR COURT OF CALIFORNIA , COUNTY OF LOS ANGELES

Date: May 20, 1991
Honorable STEPHEN E. O'NEIL, Judge
35

M. REINOSO, Deputy Clerk
R. DIGGS, E.R.M.

C 545108

(Parties and Counsel che

ROBERT NOLAN CONRAD, ET AL.,

Counsel For Plaintiff ROBERT S. MANN (X)

VS

JEROME B. ROSENTHAL

Counsel For Defendant ED KLEIN JR. (X)

NO LEGAL FILE

NATURE OF PROCEEDINGS:

MOTION OF JUDGMENT DEBTOR JEROME B. ROSENTHAL FOR RECONSIDERATION OF CONTEMPT ORDER AND ORDER OF RELEASE OF JUDGMENT DEBTOR JEROME B. ROSENTHAL

Motion is denied. The Court finds "disobedience here is not established by defendant Rosenthal to be based whatsoever on an established articulated moral principle." Thus, there is no need even to reach the question of at what point does the commitment cease to serve its coercive purpose and become punitive in character. Defendant Rosenthal's

disobedience is legal, not moral. He continues to assert only his 5th Amendment right to remain silent, which has already been legally determined to be inapplicable herein.

Also, under Code of Civil Procedure section 1008(a), there is no showing whatsoever by defendant Rosenthal of any newly discovered facts or evidence which could not have been discovered with any reasonable diligence on defendant's part.

Moving party's oral motion to allow defendant Rosenthal to wear a sweater under his County Jail uniform is granted. Sheriff's department is ordered to allow Mr. Rosenthal to wear a sweater.

Moving party's oral motion to allow defendant Rosenthal the use of a legal/runner/courier is denied.

Notice by responding party.

APPENDIX

G. Minute Order of March 5, 1991, Stephen E. O'Neil, Judge Presiding

SUPERIOR COURT OF CALIFORNIA , COUNTY OF LOS ANGELES

Date: March 5, 1991
Honorable STEPHEN E. O'NEIL, Judge
I

M. REINOSO, Deputy Clerk
R. DIGGS, E.R.M.

C 545108

ROBERT NOLAN CONRAD

VS

JEROME B. ROSENTHAL (X)

(Parties and Counsel chec

Counsel For Plaintiff: ROBERT MANN (X)

Counsel For Defendant: EDWIN J. KLEIN (X)
ARNOLD REGARDIE (X)
JOHN CAMPION (X)

NATURE OF PROCEEDINGS.

MOTION OF PLAINTIFF AND JUDGMENT CREDITOR ROBERT NOLAN CONRAD, A LAW CORPORATION AND CROSS-DEFENDANTS ROBERT NOLAN CONRAD, INDIVIDUALLY TO COMPEL FURTHER RESPONSES TO INTERROGATORIES, AND FOR MONETARY SANCTIONS

ORDER TO SHOW CAUSE RE CONTEMPT

Motion re claim of exemption, pursuant to Los Angeles Superior Court Rule 304(7 is transferred to Department 1A and continued to 3-12-91 at 9:00 am in that department. Notice

by moving party.

Motion to compel is denied pursuant to Code of Civil Procedure section 2030(1) as reflected on the electronic record of these proceedings and fully incorporated herein.

Order to show cause:

Matter comes on for hearing.

The Court rules that the Fifth Amendment privilege does not apply to these judgment debtor questions.

Cause is argued.

The Court rules as follows:

The Court finds, beyond a reasonable doubt, that:

1. Mr. Rosenthal is in contempt of Commissioner Taylor's orders issued on 11-14 and 11-21, to answer the questions with respect to the judgment debtor's examination, and

2. that Mr. Rosenthal had knowledge of that order, and

3. that he had the ability to comply with that order, and

4. he willfully disobeyed that order.

Mr. Rosenthal is in violation of Code of Civil Procedure section 1209(a)(5), disobedience of a lawful order of the court and Code of Civil Procedure sections 1209(a)(4) and 1209(a)(8), abuse of the process and proceedings of the Court and unlawful interference with the process or proceedings of the Court.

Good cause appearing, it is ordered that Mr. Rosenthal be committed to the custody of the sheriff of Los Angeles County under Code of

Civil Procedure section 1219(a), to be incarcerated until such time as Mr. Rosenthal answers the questions in the areas of injury previously stated, namely, the assets; location, nature and amount of same; his present income; his current expenses; and the questions with regard to the Traveller's money that is involved. In other words, the questions that were posed at the judgment debtor examination by Mr. Mann on behalf of the plaintiff, Mr. Conrad.

The Court orders the incarceration stayed pending a Writ of Mandate as applied for by the contemptnor.

If the Writ of Mandate is denied by the Court of Appeal, Mr. Rosenthal is ordered to surrender himself to this Court, Department 82, located on the 8th floor, 111 North Hill Street, Los Angeles, California 90012, to be remanded into custody, within 24 hours of the

decision of the Court of Appeal.

If no Writ of Mandate is filed, with respect to this Court's ruling, Mr. Rosenthal is ordered to remand himself to the custody of this department, no later than 10:00 a.m. on 3-15-91.

Order to be prepared by counsel for plaintiff, Mr. Mann.

Notice by counsel for plaintiff, Mr. Mann.

APPENDIX

H. Transcript of Proceedings, April 8, 1991

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 82 HON. STEPHEN O'NEIL JUDGE

ROBERT NOLAN CONRAD,

Plaintiff

vs.

JEROME B. ROSENTHAL,

Defendant.

TRANSCRIPT OF PROCEEDINGS

April 8, 1991

APPEARANCES:

For Defendant/
Moving Party:

EDWIN J. KLEIN
233 Wilshire Blvd.
Santa Monica 90401
(213)394-9774

LOS ANGELES, CALIFORNIA, MONDAY, APRIL 8, 1991

DEPARTMENT 82 HON. STEPHEN E. O'NEIL, JUDGE

THE CLERK: Remain seated and come to order. Department 82 is again in session. The Honorable Stephen E. O'Neil, judge presiding.

THE COURT: Okay. Roxann, we'll need to be on the record. So.

Okay. We are now going to call the case of Robert Nolan Conrad versus Jerome B. Rosenthal, case no. C 545 108. And appearance, please.

MR. KLEIN: Yes, Your Honor.

Ed Klein, K-l-e-i-n, appearing for Mr. Jerome B. Rosenthal.

THE COURT: Okay. And the matter is here because on March the 5th this year, 1991, the court found Mr. Rosenthal in contempt and had issued an order to incarcerate Mr. Rosenthal; and the court stayed that order pending a writ of mandate.

The order further read -- that again,

is the order of March 5 -- that if the writ of mandate is denied by the Court of Appeal, Mr. Rosenthal is ordered to surrender himself to this court, Department 82, located on the eighth floor, 111 N. Hill Street, Los Angeles, California 90012, to be remanded into custody within 24 hours of the decision of the Court of Appeal.

Now further, for record purposes, so we can make sure that Mr. Rosenthal is not going to be held in contempt in this sense, the Court of Appeal called this court's clerk on Thursday, I believe it was, is that correct?

THE CLERK: YES, YOUR HONOR.

THE COURT: On Thursday indicating that the writ of mandate had been denied and that that meant Mr. Rosenthal should have reported on Friday to be remanded into custody. However, because the President of the United States declared a National Day of Thanksgiving; and Judge Torres, the Presiding

Judge of the Los Angeles Superior Court indicated that no official court business would be conducted on Friday, the court asked its staff to contact Mr. Rosenthal through his counsel and indicate that he should report for being remanded into custody on Monday, today's date, April the 8th, at 8:30 in the morning; and the court will indicate just by own visual, Mr. Klein, his attorney, and Mr. Rosenthal were here promptly at 8:30 this morning.

And is there anything else that you want to add, Mr. Klein, as far as the record is concerned as to the reason for the proceeding today?

MR. KLEIN: Yes, Your Honor.

First, we gave thanks for the additional time over the weekend. We did file this morning, I have confirmed it, that we filed our petition with the California Supreme Court for writ of habeas corpus, certiorari and a review of this court's order; and we

have a copy of our petition if the court would wish to review it.

What we request this morning is the court further stay its order for an additional 72 hours until we can get some decision by the California Supreme Court as to whether or not they will stay the enforcement of this court's order pending their acceptance of the petition.

THE COURT: All right.

Why don't we first, if you would, hand to the clerk what you've filed so that I can take a quick look at it.

All right.

Court has been handed an emergency application for immediate stay order, a request by Mr. Rosenthal, through his counsel, to the Supreme Court of the State of California; and also, I would assume, the points and authorities; but it's the other document handed to the court is the emergency habeas corpus, certiorari petition for review

of contempt order, request for immediate stay of commitment order.

So let me just take a quick look.

All right.

Go ahead. Do you wish to address the court, Mr. Klein?

What I -- I am noting first, for the record, as far as the grounds for a further stay are really nothing more than what was presented to this court before, with the following exception: Exhibit 2 to the moving papers is an affidavit -- correction-- declaration of Dr. Arnold Kadish, middle initial H, indicating that Mr. Rosenthal's-- he's been Mr. Rosenthal's physician for over 30 years; that within the last 30 days, Mr. Rosenthal has suffered an attack of pneumonia, to use his words, a severe attack of pneumonia complicated by asthma, for which he has been treated. It required him to be bedridden for approximately 12 days. Recoupment is not yet complete. Also that in this Dr. Kadish's

opinion his current physical condition is such that any such exposure to additional stress like that associated with incarceration, or any similar change in environment would expose him to further possible deterioration in his health. And it's signed under penalty of perjury on April 6, 1991.

Okay. Go ahead.

MR. KLEIN: Yes, Your Honor. I believe the arguments we presented to the Supreme Court were not covered in this -- the hearing with this court. For example, our contention is that the court found Mr. Rosenthal in indirect contempt of Commissioner Taylor's order; and we would like to note that our position is Commissioner Taylor had no authority to make such an order that Mr. Rosenthal answer, since he can only perform subordinate judicial duties. There was no written stipulation. Therefore, any order of Commissioner Taylor would be null and void.

Also, Your Honor, we would note that

this court's order, we find to be overly broad and vague, in that Mr. Rosenthal has been ordered to answer unspecified and undetermined questions.

THE COURT: But wasn't that brought to the attention of the Court of Appeals which upheld this court?

MR. KLEIN: Well, as Your Honor knows, I believe there was just a summarily denial of his position. In other words there was no decision on the merits. Two judge's simply signed off on the jacket. The judges in Division 5 of the Court of Appeals, Judges Boren and Asher. So therefore, our contention is that his contentions and his arguments have not yet been determined on the merits.

As Your Honor knows, rarely are the writs granted. So we're seeking some decision on the merits as to whether or not the order of contempt is a proper order; and our arguments are those at law, not of facts.

THE COURT: All right.

Anything further.

MR. KLEIN: Yes, Your Honor. If the court denies our request to stay its own order under CCP 918, then we would request that Mr. Rosenthal be remanded to house arrest with, I believe they have a beeper system where they can determine whether or not he is, in fact, in his house, until such time as either we're able to succeed in our petition for habeas corpus, or Mr. Rosenthal agrees otherwise. But as Your honor knows, the severity of the consequences is that Mr. Rosenthal at this point is facing life imprisonment.

THE COURT: Well, that is, unless he answers the questions which Commissioner Taylor has ordered him to answer and which this court has found him in contempt for not answering.

MR. KLEIN: Yes, Your Honor.

THE COURT: As we stated on the record at the time of the hearing, the keys to the jailhouse door are contained within the

very pocket of Mr. Rosenthal.

MR. KLEIN: Yes, Your Honor; but when you face the juxtaposition of a constitutional right, and that right is not to have to incriminate yourself with your statements; and so it isn't simply a matter of a normal proceeding here. Mr. Rosenthal is asserting the fact that he is fearful that his statements, either, one, he must perjure himself, or, number two, must confess to a crime.

The court in the Troy case says, well, unless you have an immediate prosecution, you're not allowed to make that assertion. And we contend that the federal supremacy controls here and that the injurious disclosure is what's required, because if you confess to a crime, at some later point in time, particularly in this case with the diligence and the determination of the plaintiffs here, they could very easily seek to have Mr. Rosenthal brought on charges by

the district attorney.

And therefore, we do not believe he has to confess to a possible crime for which he could be later tried. He has, and the Constitution permits him the right to remain silent.

THE COURT: Well, again, that issue was addressed before Commissioner Taylor; that issue was addressed before this court; and that issue, I'm sure, was addressed before the Court of Appeals; and again the writ has been denied.

MR. KLEIN: One --

THE COURT: Go ahead. Make your record.

MR. KLEIN: --further point, Your Honor. We think the reason why the proceedings -- another reason why the proceedings are improper is because Mr. Rosenthal was asked to gamble with his consitutional rights. The record is clear that Commissioner Taylor, although the court

may disagree with us, did not make a determination of whether the Fifth Amendment was available to him.

Had the court clearly said, "Mr. Rosenthal, the Fifth Amendment is not available to you; therefore, answer the questions," then this court's order of contempt might be appropriate. But instead, Mr. Rosenthal was put in the untenable position of having to rely on his constitutional right and take a gamble if this court, as it did, found that the Fifth Amendment wasn't available, he would be filed (sic) in contempt.

The proper procedure should have been a clear determination of the availability of the Fifth before a finding of contempt could be made. It was only this court, I believe, made its own independent determination that the Fifth isn't available and then subsequently found him in contempt. That kind of a setting is impermissible, it's not a fair

due process rights, he wasn't given a clear order by the court, meaning here Commissioner Taylor, that the Fifth Amendment wasn't available.

And in light of this kind of a criminal setting in terms of habeas corpus, and in light of the requirements that any and all such orders must be very clear and specific, we believe that he is likely to prevail on his petition, assuming it's accepted.

Also, Your Honor, we find that this court's own order is impermissibly and unconstitutionally vague. You have simply required, as Commissioner Taylor, to answer questions. Mr. Rosenthal in good faith could continue to answer questions and never know when he's reached the threshold of getting out of jail.

The contention could be that's not enough, those are not sufficient, and so on. So unless there's some clear question he must

answer, we find the order too vague and overbroad.

In the case, for example, of Farr, disclosure of sources of information, that's clear. But disclosure of assets, and income and so forth is an overbroad, far too reaching situation, always leaving Mr. Rosenthal at the mercury of the opposing party.

And, again, we would urge that if the court denies our request for a stay of its own order again for a short period of time, we see no prejudice to the other side. They've already have secured over $3 million sitting in the bank for them. We find that this is simply a matter of harassment and would request that the court at least recognize Mr. Rosenthal's age, his health, he's acted in good faith. The doctor has been his personal physician for a long period of time, and that he be remanded into custody at his own premises as opposed to what I think the court can take judicial notice of the much less

humane conditions, if you will, in the jail, particularly for a man who's suffering from pneumonia and asthma.

THE COURT: Okay. The court will make the following findings with respect to this matter. The findings will be under Code of Civil Procedure, Section 918.

Number one, the court will deny any further stay with respect to my order of March 5, 1991. I also will note for the record that Mr. Rosenthal has been present and has appeared in this very court on at least, I believe, it's three occasions. That's today, April 5th--I mean April 8th--excuse me. He appeared on March the 5th. He also appeared, I believe it was on March the 12th.

But at any rate, I'm not sure of the other two dates; but he has been present in this court, the first appearance having been even at the court's request to have him come down, and he got here within 45 minutes. So I don't put one iota of credibility in Dr.

Kadish's declaration, because Mr. Rosenthal has been here every single time, has appeared every single time during this month when he allegedly is suffering from asthma and pneumonia.

He's been present physically in this courtroom. He has spoken to the court, not just through his counsel, he has stood up and spoken to this court every single time there's been a hearing on this matter. So I don't find any credibility whatsoever in Dr. Kadish's saying this man was bedridden for 12 days suffering from pneumonia and asthma.

Mr. Rosenthal has been here, he has been present, so that request is denied. Again, any further stay is denied forthwith.

The request as to house arrest is also denied. The court's order of March 5, 1991, in light of the Court of Appeals denying the writ, the defendant Jerome B. Rosenthal previously adjudged and decreed in contempt by this court on March 5th, is ordered remanded

to the custody of the Los Angeles County Sheriff forthwith.

And with respect to this matter, I will make only one further statement; that is, if Mr. Rosenthal so desires, at the end of 30 days from today's date, if he is still in custody, i.e., he has still not answered those questions, the court will entertain some sort of a request from Mr. Rosenthal to have this matter reviewed, if you will, by the court; but that will be the only request; and it will not be stayed any further.

Again, he is remanded in the custody of the sheriff forthwith. That'll be the order.

THE CLERK: Your Honor, are we going to bring him back in 30 days from today?

THE COURT: No, no, it'll have to be by noticed motion. In other words, what I'm simply saying is, in essence, a type of reconsideration, if you will; but that will be -- again, the keys to the jailhouse door are

Mr. Rosenthal's. He either answers the question, or he stays in custody pursuant to the Code of Civil Procedure sections that we cited previously.

He goes to jail today. That'll be the order of the court. Thank you, Mr. Klein.

MR. KLEIN: Thank you, Your Honor.

I would note that I do have personal knowledge that Mr. Rosenthal has been bedridden, since I've been unable to meet with him for the period of time, and I have personal knowledge of his illness. So with all due respect --

THE COURT: Well, I made my findings.

MR. KLEIN: Thank you.

THE COURT: He's been here every single time, and he's going to jail.

(Proceedings concluded.)

APPENDIX

J. Order Denying Review, filed April 18, 1991, Supreme Court of California

ORDER DENYING REVIEW
AFTER JUDGMNET BY THE COURT OF APPEAL

Second Appellate District, Division Seven
No. B057140 - SO20361

IN THE SU PREME COURT OF THE STATE OF CALIF.

IN BANK

SUPREME COURT
FILED
APR 18 1991
Robert Wandruff Clerk
DEPUTY

JEROME B. ROSENTHAL, Petitione
v.
SUPERIOR COURT FOR THE COUNTY
LOS ANGELES, Respondent

ROBERT NOLAN CONRAD, Real Par
In Interest

Application for stay and petition for review DENIED without prejudice to a renewed application by Real Parties to the Court of Appeal Second Appellate District, Division Seven, for their costs and for sanctions based on the Petition for Writ of Mandate, etc., filed with the Court of Appeal on March 25, 1991, and the Emergency Application for Immediate Stay Order and Emergency Habeas Corpus/Certiorari Petition, Etc., filed with this court on April 8, 1991. (Code of Civ Proc. section 907; Bus. and Prof. Code section

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6068, subd. (d); Cal. Rules of Court, rule 26(a).)

LUCAS
Chief Justice

APPENDIX

K. Petition for Rehearing, Court of Appeal, State of California, dated March 6, 1992.

IN THE COURT OF APPEAL OF THE STATE OF CALIF

FOR THE COUNTY OF LOS ANGELES

PLEASE NOTE: FINAL DATE FOR DETERMINATION IS MARCH 9, 1992

ROBERT NOLAN CONRAD, a Law Corporation (A California Professional Law Corporation); HARLAND N. GREEN, A Professional Corporation (a California Professional Law Corporation)	2nd Civil No. B050759
Plaintiffs and Respondents,	LASC No.C 545 108
vs.	
JEROME B. ROSENTHAL, an Individual and DOES 1 through 100, Inclusive	
Defendants and Appellants. In Pro Per	

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE RONALD E. CAPPAI, JUDGE

PETITION FOR REHEARING

(Accompanying, Under Separate Cover: Application/Request For Leave to File Late Petition For Rehearing)

*Jerome B. Rosenthal
In Pro Per
Booking #2502015;Dorm #7001
P.O.Box 86164-TerminalAnnex
Los Angeles, CA 90086-0164
-and-
6535 Wilshire Boulevard
Los Angeles, CA 90048

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Verification following p

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TABLE OF EXHIBITS

Exhibit	Description
A	Court of Appeal, Second District, ORDER, filed February 10, 1992
B	Letter dated February 5, 1992 to Arnold G. Regardie, Esq. from Jerome B. Rosenthal
C	Letter dated February 11, 1992 to Jerome B. Rosenthal from Arnold G. Regardie

*NOTE: To avoid 8-day, or more, delay in delivery, please (A) mail to both addresses, and (B) have attorney, uniformed or identified court personnel, or process server, personally deliver to Jerome B. Rosenthal at attorney-conference room (entrance), L.A. County Jail, 441 Bauchet Street, Los Angeles, CA 90012.

PETITION FOR REHEARING

(Appeal Decision, and Separate Sanctions Order - both filed February 6, 1992)

TO THE COURT OF APPEAL:

PRELIMINARY AND SUMMARY

PRELIMINARY

In 1963, clients engage Attorney "R" and the law firm he founded and heads, to recover inheritance due them. Clients' previous efforts, with several other lawyers, had been unsuccessful - spanning some 20 years. The agreement with R provided that the clients looked to R personally and primarily- to undertake and supervise the task; it accorded to R, over others in his firm, the concomitant benefits of successful waging of the will contest.

R firm instituted and prosecuted

suits under the agreement. In 1964, the principal adverse party ("V") "capitulated." Documents provided that V retain all subject property and right to it until her death; thereupon "she" relinquished all rights and claims to the property. The relinquishment was not in favor of clients alone, rather like a quitclaim instead of a grant - it was in favor of a group of possible contestants, of which clients were only one part, vying against other claimants. To recover the property, clients had to prevail over all others, and several conditions and obstacles had to be removed and fulfilled respectively by efforts of R's firm and by the occurrence of the other events.

In 1963, C was 16 years old. He was a total stranger to R, his law partners and associates, and to clients, all of whom were totally unaware of C's existence.

For some 20 years after 1964, i.e. until about 1983, R and one of his former law

partners, "L" (who before leaving R firm, had been instrumental, under R's supervision and reportable to R) had remained "at the ready" so that upon the advent of V's demise, R & L, and no one else here concerned, were to re-enter this contest and overcome all obstacles, satisfy all conditions (or eliminate the need to do so) and procure the property for clients.

V died in 1983. C then suddenly claimed the will contest fee which ultimately thereafter was determined to be due from clients, belonged to C, and not to R! C had not only paid nothing to R, but also had interim demanded and received from R, an agreement that C owed no duty to perform services for R. C had done literally nothing to help clients recover.

A trial court and jury decided that C, and not R, owned the fee due from clients. R appealed to this Court.

Any fair-minded, unbiased, objective

person, upon being exposed to the above outline, would react with: "There must be something seriously wrong here - the result is unthinkable and intolerable. The obvious injustice must be rectified immediately."

But not this Court. Why? The outrageous injustice or travesty is inherent in the Court's decision, and its award of (separate) sanctions against R. The Court's unbelievable dissertations against R cry out for, and exemplify the need and purpose of rehearing. The role of rehearing function is to provide to the "losing party" (here R) who avails himself of the opportunity afforded by the rule [rehearing availability]."

"If we are satisfied from the petition, that owing to any mistake of law, or misunderstanding of the facts, our decision has done an injustice..., or if the principle involved is important, and the decision will make a precedent establishing a rule of property or of right, and it is seriously

doubted whether we have correctly decided, we grant a rehearing." **In re Jessup** (1889) 81 C 408, 471; see **San Francisco v Pacific Bank** (1891) 89 C 23, 25; 9 **Witkin**, Cal. Proc. 3d, Appeal, Rehearing, Sections 682, 683, 684.

But this Court has obviously seen fit to ignore the time-honored fair play teachings of the **Jessup** Court - and all of the reviewing Courts that have followed those teachings without any sincere deviation for over 100 years. To achieve such an ignoble result this Court has had to engage in tortuous manipulations of law and of facts - and it did so. Its egregious departure from fairness and justice represents a regrettable triumph of blunder, bluster and sophistry over clear and simple logic. Its decision, if rehearing is **not** granted, will have made a mockery of the Magna Carta and all of the anti-tyranny ideology it crystallized to guarantee a free and just society among free men. Unless reconsidered and rectified, the

Decision/Opinion of this Court will have caused dear old King John to roll over, nay, to twirl in his grave.

Any deliberate and thinking person must ask - why? What dynamics could possibly have caused this aberration - by a Court which is ordinarily considered an outstanding unit in one of the most respected and enlightened judicial systems in the world?

The answers, the choices, appear to be few at the outset. Bias and prejudice against Petitioner is prominent among the possibilities. Next is the attractive idea that the Court permitted itself to be led astray by the unscrupulous misleading trickery of Conrad's Counsel, Mann. In a sense, if that be the leading cause, the Court would be partially excused for its serious errors- Courts do have an inherent right to rely preliminarily on their "officers", if that designation is not a fiction. With the same result is the grave series of Mr. Regardie's

fraudulent or inexcusably misleading misrepresentations to, and his shocking lack of candor to the Court.

Details below - time and jail circumstances permitting.

Petitioner prefers to believe and to ferverently hope that the explanation of the aberration is the combination of the deceitful conduct of Messrs. Mann and Regardie. The Court has probably relied on the pernicious mischaracterizations of the facts and law, instead of independently and impartially examining the facts and correctly determining and applying correct law(s) to achieve a just result.

SOME CUSTODIAN (JAIL) CIRCUMSTANCES

Briefly,

(a) April 8, 1992 - Petitioner's 333rd day in confinement;

(b) Housing: in a small, sealed, locked cell;

(c) Shared with 5 to 10 inmates;

(d) Peace and quiet - not a bit. Bedlam, plenty;

(e) Noise and disturbances- ceaseless;

(f) Light inadequate;

(g) Reading, writing surfaces- none in cell;

(h) Law library - limited, incomplete, volumes missing, pages vandalized, etc. (This is a description - NOT a complaint). Available to Petitioner only commencing at 10:00 p.m. - with resultant exhaustion;

(i) Conducive equipment: none. No dictating or copying devices. Handwriting only. (Petitioner's is atrociously illegible). Snail's pace for productivity.

(j) Reliability of availability of facilities: None. Terminable without warning or notice - at any moment. This feature may account for a most incomplete instant petition - abruptly ended - likely.

Indulgence solicited.

The importance of the last feature, sub (j) - is intensified here and now. Time (rehearing petition) is famously or infamously short. Its limitation was made insufferable here due to Court's own omissions, inactions, and oversights - (serious due process violations consequent). Details below- again, time permitting: Absence of details will signal the unavoidably abrupt termination of this writing.

SUMMARY

(NOTE: No time available for completion of this section - or for editing or completion of this petition. Please see, inter alia, the application/request for late filing leave -for reasons/causes of "no time available").

THE COURT'S MOST TELLING FACT BLUNDER; AND ERRORS OF LAW.

Although in several places[1] the Opinion recognizes and states that no fee could be recovered from or payable by the Heinz clients until at least the very first contingency (Vira's demise) took place, it proceeds to an illogical impasse - and leads to the Court's most egregiously erroneous conclusion - a conclusion that makes Petitioner absolutely correct. The Court quotes from the July 1973 agreement which Petitioner entered into "with Attorney Rhoads" in which, the Court goes on, Rosenthal, Cook, and Green's assets are described as "amounts now due from others for the previous rendition of services." (Emphasis added) No one concerned doubts that Vira was very much alive

---

[1] The Opinion is fraught with vague references to evidence or record, e.g. "overwhelming evidence indicated", "numerous documents...indicated", and "hundreds of documents and thousands of pages of transcript." Petitioner occasionally simply follows suit, in a milder degree, having no choice; but petitioner neither approves nor endorses the practice.

in July 1973. Ergo, since Vira's death had to take place before any fee was or could be due from Heinz clients, it is irrefutable that the "Heinz fee" could not possibly have been "now [then] due", i.e. as of July 1973. The Court's voluntary or deliberate excursion into the mire of semantics does not and cannot rationally succeed in overcoming the ineluctable. Saying, as the Court does, that the fee was only not "then payable" does not mean that it was then "due." It wasn't. And it was not transferred to the Rosenthal and Rhoads Professional Corporation. In contending or concluding otherwise, the Opinion demonstrates its foundational factual infirmity. The "Heinz fee" was not "now due" but "simply not payable." (Opinion, p. 20)

Moreover, only Rhoads and Rosenthal were on the scene in July 1973. And the Court apparently concedes that Rhoads' position is that the so-called "Heinz fee" was not then transferred to the Professional Corporation.

True, Rhoads was the sole legal owner of the stock in the Professional Corporation. And since the Opinion is replete with the idea that the corporation's "assets" are owned by its stockholders, that assertion reflects these weaknesses that the idea does not determine what the assets are. Nor does the idea mean that Rhoads is the equitable owner of the stock, as well. Rhoads rejects the inclusion of the "Heinz fee" in the assets purportedly transferred. Therefore, he rejects the conclusion that he alone owns both legal and equitable interests in the stock, at least insofar as it could mean that he owned all interests in "the asset."

To conclude otherwise is to contend that there is no such phenomenon or relationship as the involuntary trust - a contention the Opinion advances - along with its contention that unjust enrichment is not here applicable to flatly prohibit the trial court's and jury's decision that Conrad owns

the Heinz fee. The unjust enrichment principle is deeply ingrained in California law. No exceptions. **Palakis v Paras** (1948) 86 CA2d 243; **South v Wichard** (1956) 146 CA2d 277, 284.

On the same note, a constructive trust is implied not because of the intention of parties but because person holding title to the property would profit by a wrong or be unjustly enriched if he were permitted to keep the property. **Simpson v Bruder** (1948) 47 CA2d 431.

Or, if you will, let's now look at the intention of the parties, Rhoads and Rosenthal, in 1973. A resulting trust arises from a transfer of property (the stock, here) under circumstances from which it can be inferred that the transferee was not intended to take the beneficial [equitable] interest. **Cal Jur. III, Trusts**, Section 260. A resulting trust differs from an express trust in that it arises by operation of law, and

also in that it imposes on the resulting trustee no duties other than to hold or convey according to the beneficiary's demands. Ibid, Section 261, and it differs from a constructive trust in that it carries out the inferred intent of the parties. Ibid, Sections 287-307.

A constructive trust is a trust by operation of law, that arises contrary to the intention of the parties, where a person who holds title to property is under an equitable duty to transfer it to another on the ground that he would be unjustly enriched if he were permitted to retain it. Ibid, Section 287. The trust is, essentially, a remedy used by a court of equity to compel a person who has property to which he is not justly entitled to transfer it to the person entitled to it. Ibid, Section 288.

These doctrines (constructive and resulting, collectively involuntary trusts) are as old as the Statute of Uses, 1536, in

which Henry VIII recognized and crystallized them. See also Civil Code 2223, 2224; Probate Code, 15003. The Opinion would ignore the venerability and the existence of the doctrines. Why? Because Mann said so? Or because of the Court's bias and prejudice against Petitioner? Or because of unexplained and perhaps inexplicable but extreme error?

PETITIONER'S PRIVATION; COURT'S OMISSIONS, INACTION(S), ETC.

Not until February 24 (some 50 days too late - after the fact) did Petitioner learn that oral argument had taken place on December 4, 1991. Conrad, Mann, Regardie, Green, etc. were informed of its scheduled pendency long before December 4. Everyone but Petitioner - although predictably, Petitioner had more at stake than any other interested person. To emphasize the denial of his rights (See 9 **Witkin** Procedure 3d, Section 545), oral argument (and incident rights to participate or observe) actually excluded Petitioner - and

was left to his two leading adversaries: Mann and Regardie.

That act or omission took place despite the Court's abundant information and knowledge - in its own files! - that Petitioner was in Pro Per - and had no actual or functional representation whatsoever! Both Regardie and Petitioner were in absolute accord (effectively a virtual stipulation) that Regardie no longer represented Petitioner. The Court had much (120 days) notice: see e.g. Petitioner's (filed) September 9, 1991 "...Response To...Regardie's [Motion To] Withdraw As Attorney For...Rosenthal", Exh. E of which (Regardie letter June 25, 1991, to Mann, that Regardie had ceased his services ostensibly for (but in ultimate result, against) Petitioner, before Regardie's withdrawal motion was even heard by Superior Court (R.T., August 6, 1991 - before Hon. S. E. O'Neil, Judge). Exh. "F" to the September 9, 1991 Response reflects the

duplicity of Regardie and Mann in misleading this, and the California Supreme Court.[2]/ Ultimately, this Court issued its February 10, 1992 Order (Exhibit "A" hereto) granting Regardie's Motion to be relieved as Petitioner's attorney, while totally ignoring Petitioner's requested conditions and sanctions as incident to the withdrawal. (See p. 13, of Petitioner's Declaration in his September 9, 1991 (filed) "Response". Also, see Exh. "B" and "C" hereto, respectively Petitioner's demand for files, records, etc. from Regardie, and the latter's reply of February 11, 1992. NOTE: On August 6, 1991, Regardie told Judge O'Neil that he "had a file" but that he didn't know, wasn't aware

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[2]/ Without paying any attention to Mann's and Regardie's misleading omissions and misleading statements, how could this Court have possibly fairly imposed sanctions contained in its February 6, 1992 Appeal Decision (and its separate and accompanying) Sanctions Order? (Mann, Regardie's co-culprit escapes completely, and Regardie partially. Shocking. While Petitioner is denied effective notice and hearing, and access to Court(s)).

of, what files, etc. Petitioner wanted. Suddenly, February 11, 1992 (six months later) Regardie **does** know - still has not delivered. Meanwhile, Petitioner goes without - and the Court disregards the entirety of Regardie's transgressions and deceit perpetrated on this Court.

Admittedly out of orderly sequence (no time available for completion, reorganization or other editing of this writing) attention is directed to another of this Court's misunderstandings of facts and misapplication of law, please see **Ex Parte Clarke** (1894) 102 C 352. That decision has been (and is) the law in California for 100 years; it binds this Court to (following **Jessup** dictates, **supra**) use its authority and honor its obligations to accord required relief by the vehicle of rehearing grant - or associated method. **Clarke**, a case of post-judgment examination of debtor, flatly mandates the recognition of the self-

incrimination privilege as applicable (there and here) as controlling over the needs or rights of creditors. Noteworthy also is the fact that Penal Code Section 154, and 155 are also still in place, materially unchanged- during the same century - this Court's observations to the contrary notwithstanding!

(Note: No time available for completion or editing of this Petition. For explanation of some reasons, grounds, please see, inter alia, Application/Request for Late-Filing Leave - accompanying this Petition).

Also Note: Frauds of Mann (Conrad Counsel) perpetrated upon Superior and on this Court, will be more fully detailed in Writ Petitions to be filed in this Court, per previous advices.

March 6, 1992. Respectfully submitted,

Jerome B. Rosenthal,
In Pro Per,
Petitioner

APPENDIX

L. California Constitution, Article VI

CALIFORNIA CONSTITUTION

"ARTICLE VI - JUDICIAL

SECTION 1 JUDICIAL POWER; COURTS OF RECORD

Sec. 1. The judicial power of the state is vested in the supreme court, courts of appeal, superior courts, municipal courts, and justice courts. All courts are courts of record."

SECTION 4. SUPREME COURT: JURISDICTION

Sec. 4. The Supreme Court shall have appeal jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in municipal or justice courts; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine also, in all such probate matters as may be provided by law; also, on questions of law alone, in all criminal cases where judgment of death has been rendered; the

said court shall also have appellate jurisdiction in all cases, matters, and proceedings pending before a District Court of Appeal which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision, as hereinafter provided. The said Courts also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court or before any District Court of Appeal, or before any justices thereof, or before any Superior Court in the State, or before any judge thereof."

Sec. 4 b <u>District Court(s) of Appeal; Jurisdiction.</u>

"Sec. 4 b. The District Courts of Appeal

shall have appellate jurisdiction on appeal from the Superior Courts (except in cases in which appellate jurisdiction is given to the Supreme Court) in all cases at law in which the Superior Courts are given original jurisdiction; also, in all cases of forcible or unlawful entry or detainer (except such as arise in municipal or in justices' or in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, prohibition usurpation of office, removal from office, contesting elections, eminent domain, and in such other special proceedings as maybe provided by law; also, in questions of law above, in all criminal cases prosecuted by indictment or information, except where judgment of death has been rendered.

"The said courts shall also have appellate jurisdiction in all cases, matters, and proceedings pending before the Supreme Court which shall be ordered by the Supreme Court to be transferred to a District Court of

Appeal for hearing and decision. The said courts shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. Each of the justices thereof shall have power to issue writs of habeas corpus to any part of his appellate district upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the District Court of Appeal of his district, or before any superior court within his district, or before any judge thereof."

APPENDIX

M. California Statutes; Code of Civil Procedure; Business and Professions Code

CAL. STATUTES

Code of Civil Procedure, Section 128.5. Frivolous actions or delaying tactics; order for payment of expenes.

128.5 "(a) Every trial court shall have the power to order a party or the party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of tactics or actions not based on good faith which are frivolous or which cause unnecessary delay. Frivolous actions or delaying tactics include, but are not limited to, making or opposing motions without good faith.

"(b) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; on the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or

circumstances justifying the order."

CODE OF CIVIL PROCEDURE

"Section 907. Damages for Frivolous Appeal, Appeal Solely to Delay

When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just."

"Section 923. Power of Reviewing Court Not Limited to Chapter Provisions

The provisions of this chapter shall not limit the power of a reviewing court or of a judge thereof to stay proceedings during the pendency of an appeal or to issue a writ of supercedeas or to suspend or modify an injunction during the pendency of an appeal or to make any order appropriate to preserve the status

quo, the effectiveness of the judgment subsequently to be entered or otherwise in aid of its jurisdiction.

BUSINESS AND PROFESSIONS CODE

"Section 6068. It is the duty of an attorney to do all of the following. . . .

"(d) to employ for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artiface or false statement of fact or law."

APPENDIX

N. California Rules of Court

CALIF. RULES OF COURT (CRC)

CRC. Rule 24

"(a) [When discussion becomes final] all decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties.

"A decision of the Supreme Court becomes final 30 days after. . .An order of the Supreme Court, denying a petition for review of a decision of a Court of Appeal becomes final when it is filed. . . .

"When a decision of a reviewing court is final as to that Court, it is not thereafter subject to modification or rehearing by that court. . .

Rule 26. COSTS ON APPEAL

"(a) [Right to Costs] Except as provided in this rule, the prevailing party shall be entitled to costs on appeal as an incident to the judgment on appeal. In the

case of a general and unqualified affirmance of the judgment or the dismissal of an appeal, the respondent shall be deemed the prevailing party: in the case of a reversal, in whole or part, or of a modification of the judgment, the appellant shall be deemed the prevailing party. In any case in which the interests of justice require it, the reviewing court may make any award or apportionment of costs it deems proper. In probate cases, in the absence of express direction for costs by the reviewing court, costs on appeal shall be awarded to the prevailing party, but the superior court shall decide against whom the award shall be made. . .

"Where the appeal is frivolous or taken solely for the purpose of delay or where any party. . .has been guilty of any other unreasonable infraction of the rules governing appeals, the reviewing court may impose upon offending attorneys or parties such penalties. . .as the circumstances of the case and the

discouragement of like conduct in the future may require. . ."

RULE 41. **MOTIONS IN THE REVIEWING COURT.**

(b) [Disposition of Motion]

". . .when a motion has been placed on the calendar for hearing the clerk shall mail to each party a notice thereof showing the date and time designated for the hearing. . ."

COURT OF APPEAL, 2ND DISTRICT, DIVISION FIVE

"INTERNAL OPERATING PRACTICE & PROCEDURE"

"SECTION VIII - ORAL ARGUMENT"

"The division does nothing to discourage oral argument in any particular case."

APPENDIX

O. Petition for Review, Supreme Court of California, dated March 15, 1992

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEROME B. ROSENTHAL, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent, ROBERT NOLAN CONRAD, Real Party In Interest)	2nd Civil No. B050759 LASC No.C 545 108

PETITION FOR REVIEW

*Jerome B. Rosenthal
In Pro Per
Booking #2502015; Dorm #7001
P. O. Box 86164 - Terminal Annex
Los Angeles, CA 90086-0164
-and-
6535 Wilshire Boulevard
Los Angeles, CA 90048

*NOTE: To avoid 8-day, or more, delay in delivery, please (A) mail to both addresses, and (B) have attorney, uniformed or identified court personnel, or process server, personally deliver to Jerome B. Rosenthal at attorney-conference room (entrance), L.A. County Jail, 441 Bauchet Street, Los Angeles, CA 90012.

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No. 1: Does Court of Appeal's failure to notify Appellant of the fact, date, time and place of oral argument violate Appellant's due process notice and hearing, or other right(s) requiring reversal or other relief from subsequent affirming judgment and imposing sanctions for frivolous appeal?

No. 2: Where Appellant had no information, from any source, of the scheduling details (fact, date, time, place) of oral argument and without fault, did not attend, will this Court grant any relief after Court of Appeal denied rehearing following affirming of judgment and imposition of frivolous appeal sanctions?

No. 3: Whether all other interested parties' representation by counsel and participation in oral argument, deprive Pro Per and only Appellant of due process or other fundamental rights where Appellant's attendance and participation are prevented by Court's and Counsel's failure to notify Appellant of oral argument event or of day, time, place details.

No. 4: Whether Court of Appeal has

duty to consider and to act upon all material requests of movant and of responding party, or to indicate attention, favorable or not, to each material request for relief. If such duty is owed, what is available relief from failure to discharge it?

No. 5: Whether the imposition of sanctions by Court of Appeal on Petitioner (following this Court's denial of petition for review and stay of contempt order) is valid or enforceable against petitioner when Court of Appeal (1) gave petitioner no notice of any kind of its hearing, (2) received evidence (declaration) from other respondent against whom sanctions were sought, without requiring copy to be sent to petitioner, (3) did not sanction that respondent and (4) sanctioned only petitioner although (5) Court of Appeal was on undisputed notice that such respondent had, by inaction, fraudulently misled this Court into its tacit suggestion to Court of Appeal to impose sanctions.

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No. 6: Whether under no circumstances, the federal and state privilege against self-incrimination is available to debtor in judgment debtor examinations.

No. 7: Where Court of Appeal failed to give, or cause to be given, any notice to Appellant that it had both decided appeal and granted sanctions against him until after he had, activated by rumor, inquired of Court, so that he had no copy of appeal decision or sanction order until 21 days after their filing, was Appellant (instant petitioner) deprived of due process or other fundamental right in that his times for filing petitions for rehearing and review, respectively, were materially and prejudicially shortened?

No. 8: Whether the doctrine proscribing unjust enrichment is a viable principle of California law.

No. 9: Whether involuntary, i.e. resulting or constructive trusts are recognized and enforceable in California.

No. 10: Whether any form or degree of involuntary servitude is lawful in California.

No. 11: Whether estoppel by conduct may be used offensively (by a plaintiff or cross-complainant)

in California.

No. 12: Whether the rights and obligations to serve of a personal service contract between lawyer and client is assignable without the client's consent and before the services

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Section 68 7,8

LIST OF EXHIBITS

Exhibit	Description
C	California Supreme Court ORDER DENYING REVIEW, filed April 18, 1991
D	REPLY OF PETITION TO OPPOSITION OF REAL PARTY IN INTEREST TO EMERGENCY H A B E A S CORPUS/CERTIORARI
ORDER	PETITION FOR REVIEW OF CONTEMPT
SANCT Order filed	Court of Appeal's Granting Sanctions, February 6, 1992

PETITION FOR REVIEW

TO THE SUPREME COURT OF THE STATE OF CALIFORNIA:

ISSUES PRESENTED FOR REVIEW:

No. 1: Does Court of Appeal's failure to notify Appellant of the fact, date, time and place of oral argument violate Appellant's due process notice and hearing, or other right(s) requiring reversal or other relief from subsequent affirming of judgment and imposing sanctions for frivolous appeal?

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No. 12: Whether the rights and obligations to serve of a personal service contract between lawyer and client is assignable without the client's consent and before the services are completed.

ARGUMENT, AUTHORITIES IN SUPPORT OF THIS PETITION FOR REVIEW

INTRODUCTION

In 1963 clients engage their close friend and highly satisfactory (in previous matters) attorney R and the firm he organized, founded and heads, to recover inheritance due clients. Over the preceding 20 years clients' previous efforts, with several lawyers had been unsuccessful.

The agreement provided that clients looked to R personally and primarily to undertake and supervise the project; it accorded to R, over others in his firm, the benefits that could materialize if the task was successful.

The R firm promptly prepared and started suits. In 1964, the first and principal adverse party, "V", "capitulated"; documents provided that V retain all subject property and rights to it until her death,

upon which event, she agreed, she relinquished all rights and claims to the property. The relinquishment was not in favor of the clients alone; in effect it was in favor of a group of possible contenders or contestants, of which clients were only one part.

To recover the inheritance property, clients (and R and his firm) had to prevail over all others; several conditions had to be met, obstacles had to be removed by R firm efforts, and by the occurrence of other events.

In 1963 one Mr. C was 16 years old. He was a total stranger to R, his law partners and associates, and to clients, all of whom were totally unaware of C's existence, as C was of theirs.

For the next 20 years, i.e. until about 1983, R and one of his former law partners, "L", remained "at the ready" so that when V died, R & L (and no one else here concerned) were to re-enter the fray, overcome

all obstacles, satisfy all conditions (or eliminate the need to do so) and procure the property for the clients. Before he had left the firm, L had been instrumental and successful, under R's supervision and reportable to R, in inducing the capitulation of "V".

V died in 1983. Literally "out of nowhere", C suddenly claimed that the will contest legal fee which later was determined to be due from clients, belonged to C, and not to R!

C had paid nothing to or for R, and had done literally nothing to help clients recover.

A trial court and jury decided that C, and not R, owned the fee due from the clients. The gross fee is about $4 million. R appealed to the Court of Appeal.

Certainly any fair-minded, unbiased, objective person would react with shock, saying: "There must be something wrong here;

it's unbelievable. Surely such an injustice should be and will be rectified immediately."

Sadly, Mr. Everyman's confidence in his judiciary is misplaced, at least temporarily.

The Court of Appeal not only affirmed, but it also sanctioned R, and not either of the two true culprits who seriously abused the system. C's lead counsel succeeded in so completely and literally "hoodwinking" the Court of Appeal (as he had done in the trial court) by consistently and fraudulently misstating and misrepresenting facts and law- that the Court of Appeal accepted his statements and versions without examining the evidence or authorities. Even his appeal brief followed the same pattern - while the appellate court apparently ignored the explicit exposures of his deviousness which are contained in R's Reply Brief. R's former counsel, "A", who incidentally perpetrated his own deception on this Court (details below,

time permitting) to conceal his own incompetence and to escape consequential sanction by this Court. And he "got away with it" so far!

The Appeal Court's unbelievable, and woefully unfounded and disgracefully wrong, dissertations against R - cry out for and exemplify the need for review, and the reason for the existence of the process.

"If we are satisfied from the petition, that owing to any mistake of law, or misunderstanding of the facts, our decision has done an injustice..., or if the principle involved is important, and the decision will make a precedent establishing a rule of property or of right, and it is seriously doubted whether we have correctly decided, we grant a rehearing." **In re Jessup** (1889) 81 C 408, 471; see **San Francisco v Pacific Bank** (1891) 89 C 23, 25; 9 **Witkin** Cal. Proc. 3d Appeal, Rehearing, Sections 682, 683, 684.

But the Court of Appeal has obviously

seen fit to ignore the time-honored fair play teachings of **Jessup**, supra - and of all of the reviewing Courts that have followed those teachings without any significant deviation for over 100 years. To achieve such a disgraceful result (affirming judgment, imposing sanctions, and denying rehearing) the Appeal Court has had to engage in tortuous manipulations of law and facts - and it did so; it represents a most regrettable triumph of blunder, bluster and sophistry over clear, simple, ordinary straightforward judicial analysis.

PETITIONER'S RESTRICTED TIME

Petitioner pauses here - refraining from further, full expository summary in this INTRODUCTION. Because of the unavailability of time (please see Issue No. 7, supra), the Court is respectfully directed to Petitioner's PETITION FOR REHEARING. PURPOSE: shows that Petitioner had substantially less time than is

ordinarily available for preparation, under difficult amid calendar-devouring circumstances (Petitioner's incarceration ironically procured by the errors of trial court, the gross negligence, incompetence and deceit of "A" and extended - to now over 330 consecutive days - by A's failure to deliver files and papers to Petitioner during

the period. Both the trial court and Court of Appeal (Issue No. 4, supra) have ignored and not considered Petitioner's timely requests for order(s) compelling "A" to turn over the documents, to facilitate and enable Petitioner to comply with Petition/Briefing requirements of this Court and Appeal Court, and to enable completion of Petitioner's effort to secure release from incarceration - otherwise interminable. Like the house that Jack built, one extraordinary reason begets another; so that Petitioner could not possibly have completed PETITION FOR REHEARING and cannot timely complete and file this PETITION FOR REVIEW. (Please also see Petitioner's APPLICATION FOR LEAVE TO FILE LATE PETITION FOR REHEARING, filed March 9, 1992).

Petitioner is mindful of California Rule of Court, 29(b)(2) "LIMITATIONS", and respectfully solicits this Court's indulgence in permitting presentation to this Court (in supplemental writing, brief) of matters not

covered in REHEARING PETITION, whether pursuant to Rule 29.2 or otherwise.

R.P.I.'s TRICKERY ON THIS COURT

Admittedly out of orderly sequence, this Court is respectfully requested to next consider Conrad's (Real Party in Interest) counsel's trickery perpetrated on this Court, another most extraordinary incident, finally addressed (here) to the proper authority, i.e. this Court. Court of Appeal's Order granting sanctions filed February 6, 1992 (Exhibit tabbed "SANCT" hereto) states, on its page 2, "The Supreme Court denied Rosenthal's request for relief 'without prejudice to a renewed application by Real Parties to the Court of Appeal...for their costs and sanctions based on the Petition for Writ of Mandate...'". (A copy of this Court's ORDER DENYING REVIEW, filed April 18, 1991, is attached hereto as EXHIBIT "C").

RPI Conrad/Mann had filed in this Court their OPPOSITION OF REAL PARTY...TO

EMERGENCY HABEAS CORPUS/CERTIORARI PETITION FOR REVIEW OF CONTEMPT ORDER, flatly and falsely stating that Petitioner had stipulated to Commissioner Taylor's conducting a judgment debtor's hearing.

Petitioner's then counsel REGARDIE/KLEIN prepared a "REPLY OF PETITIONER TO OPPOSITION OF REAL PARTY...TO EMERGENCY HABEAS CORPUS...PETITION...FOR REVIEW OF CONTEMPT ORDER (the same contempt order that sent Petitioner to L.A. County Jail in still ongoing confinement), dated April 18, 1991. THAT REPLY, ALTHOUGH COMPLETED ON APRIL 18, A.M. WAS NEVER SENT TO THIS COURT BECAUSE THIS COURT'S "ORDER DENYING REVIEW" (EXC. "C" hereto) WAS RECEIVED BY REGARDIE/KLEIN BEFORE THE "REPLY" WAS SENT TO THE COURT.

Despite repeated demands, Regardie refused to send the REPLY (to fully inform this Court) on April 18, 1991 - or at any time thereafter - to this day.

But for Regardie's dilatory,

negligent, inexcusable delay in forwarding to Klein the pleading that prompted the preparation of the REPLY, the REPLY would have fully informed this Court that the RPI representation (in RPI's "OPPOSITION...") was a totally false and misleading statement, on which this Court relied in its "ORDER DENYING REVIEW." (Incidentally the denial was summary, not on merits.) Fully informed, this Court would not have impliedly suggested to Appeal Court the sanctions mentioned in EXH. "C", because REPLY plainly showed, as a matter of law, that Commissioner Taylor had no jurisdiction to (and in fact did not purport to) enter a contempt order or make any actual order the disobedience of which could be contemptuous. (Please see EXH. "D", p. 1 et. seq. the portion headed "PETITIONER DID NOT STIPULATE TO A COMMISSIONER").

Quite evidently, the Appeal Court's sanction Order, EXH. "SANCT", expresses its displeasure with Petitioner personally,

imposes sanctions on him, while Attorneys Mann and Regardie, the culpable and fraudulent "go free."

More importantly, the degree of hostility and displeasure thus evidenced by Appeal Court for Petitioner personally obviously contributed to the extreme prejudice (perhaps only born of misinformation and mistake) of the Court that influenced its shockingly erroneous and improper "Affirming" of trial court judgment and denial of rehearing.

MYSTERY: HOW COULD/DID PETITIONER LOSE, SO FAR?

Apart from the occult, it is difficult to understand at first blush just what forces combined to make it possible that Appellant/Petitioner could "lose", and plaintiffs prevail. Viewed empirically, the result thus far is so outrageously unjust,

unfair and unlawful, that many and strong factors and forces must have contributed to the severe aberration.

The severe, and unusual shortage of time makes it possible to briefly illustrate examples of those forces. Almost textbook-like, the leading forces include:

-Court's mistake of facts

-Court's mistake of law

-Plaintiff's misleading practices, methods; fraudulent

-Courts' bias and prejudice against Petitioner, vigorously fanned and fomented by diabolically effective but deceitful misrepresentation-based on influences by plaintiffs, on Courts.

As previously stated, the shortage of time is described and explained in PETITION FOR REHEARING, particularly, especially Page 5 of EXH. "A". Also contributing is

Petitioner's lack of documents and files, Mr. Regardie's continuing failure to deliver and the Courts' failing to rule on or dispose of Petitioner's requests for order(s) compelling him to do so and for orders imposing sanctions on Regardie incident to his withdrawal.

Thus, with apology for brevity, Petitioner will attempt in the minutes available before termination of this Petition is reached, to point out some of the illustrating infirmities in opponents' positions and in Courts' treatment.

-Conrad, Mann concentrate heavily on vilifying Petitioner, prejudicing Judge, Jury and Appellate Court against Petitioner

-Significant omission: Conrad totally fails to explain how the professional corporation could, in turn convey or sell the rights and obligations of

Petitioner (to earn and to serve respectively), since those rights (and obligations) were never acquired by the corporation. Nor does Conrad point to any substantial evidence to such effect. He cannot - and does not - not even the testimony of his own witnesses.

-Only Rhoads and Rosenthal were "on the scene" in July 1973- and both testified that the rights, etc. to possibly earn and thus own the fee was not transferred to the professional corporation formed by Rhoads.

-Conrad's (Respondent's) frequent urging of contested "evidence" without any citation to the record is a "hot air" tactic that obviously impressed

jury, trial court, and Appeal Court - subject: the amount of the fee when finally paid (into stakeholder trust) by clients, i.e. $3 million. No place in the record cited by Conrad does any such amount appear.

-When Conrad's attacks on Rosenthal are disregarded, Conrad's entire case collapses for want of credible, relevant evidence.

-The only time when rights to the fee or possible fee could possibly have been conveyed to the corporation was July 1973, when

(a) Rhoads and Rosenthal testified that it wasn't- (and no other witness was "there").

(b) The only document (July

1973 agreement) extant or then created, explicitly excludes such fact - by undisputed and undisputable clear, direct evidence- the contract itself.

-Among the most outrageously incredible and false contentions of Conrad is the idea that Rosenthal documents introduced at State Bar showed that Rosenthal then (1975) did not own any interest in the so-called, possible "Heinz" Fee. How could Rosenthal possibly have "used" the Heinz case with which to pay attorneys' fees for State Bar representation ranging from $150,000 upward (to possible $500,000)? The Heinz case was then (1975) known (no dispute in trial or Appeal

Court) to be lost or won - in the unpredictable future, at that.

(At this juncture, Petitioner Rosenthal readily acknowledges that in the sections he makes no cites or reference to the record. It will be remembered that Rosenthal has no "record" - that Regardie still has not delivered it. Petitioner requests Court's indulgence for these "no cite" illustrations- randomly chosen.)

Filing deadline now makes Petitioner end this presentation. This writing (hand) must be picked up here at the L.A. County Jail, taken (Sunday, March 15, p.m.) to secretary for typing before filing tomorrow in Supreme Court.

CONCLUSION

Petitioner Rosenthal respectively requests an opportunity (to compensate for lost time due to actions, omissions of Court

of Appeals to notify Petitioner of oral argument, and especially, failure to timely or fairly notify Petitioner that Appeal and Sanctions Orders had been decided, entered) to supplement this writing or replace it with one, a petition fully developed on all pertinent points, and fully authenticated and supported by citations to record and to authorities.

That request is made with, or without, as this Court deems proper under the circumstances, reference to California Rules of Court, Section 29.2.

Petitioner is, of course, intimately familiar with "the case" - from memory. Petitioner waited some 20 years for the Heinz case to possibly materialize and permit completion of the task and possible recovery of the fee. Similarly, Petitioner is familiar with the litigation here in issue; the avidity of his familiarity enables him to assure this Court that the case presents an ideal

situation for the granting of review, and that its present point fits squarely, and unusually well, with all of the "Grounds" requirements of Rule 29.

DATED: March 15, 1992.

Respectfully submitted,

JEROME B. ROSENTHAL
Petitioner, In Pro Per

APPENDIX

P. Appellant's Opposition To Renewed Application For Sanctions; Hearing Requested

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

ROBERT NOLAN CONRAD,
etc. et al.,

Plaintiffs,

vs.
JEROME B. ROSENTHAL,
etc. et al.,

Defendants.

Case No. C 545 108
2d Civil BO 57140

APPELLANT'S OPPOSITION TO
RENEWED APPLICATION FOR
SANCTIONS;
HEARING REQUESTED.

L.A. COUNTY SUPERIOR COURT
HONORABLE STEPHEN O'NEIL, JUDGE

ARNOLD REGARDIE
EDWIN J.KLEIN,JR.
7437 Topanga Cyn.
Canoga Park,CA

Attys for Appellant
JEROME B. ROSENTHAL

I
INTRODUCTORY STATEMENT

Real Party In Interest, ROBERT NOLAN CONRAD, A Law Corporation, ("RPI") has reapplied for sanctions at the invitation of the California Supreme Court, pursuant to the court's order dated April 18, 1991. Petitioner JEROME B. ROSENTHAL ("ROSENTHAL") respectfully submits that his appeal of the contempt order was eminently meritorious; was not frivolous or for purpose of delay; nor does it contain misleading statements of law or fact. The lack of frivolity will be explained herein. **But most importantly, where a litigant's liberty is at stake, a review of the due process and other constitutional safeguards involved in a contempt order leading to incarceration, should be considered a fortiori as not being frivolous!** Moreover, it should be noted that RPI, not content to merely seek sanctions for the time and costs involved in the appeal, has added (without court authorization) the time and costs

involved in pursuing the judgment debtor examination process. [RPI Brief, p. 13-14, items 1-8; Declaration Robert Mann, Items A-H]

Procedural Summary

Briefly, the facts are as follows. ROSENTHAL was incarcerated on April 8, 1991, after having been held in indirect contempt of commissioner Taylor's purported order by Judge Stephen O'Neil, Dept. 82, Los Angeles Superior Court, for not answering certain questions in a judgment debtor proceedings as reflected in the transcripts of the November 14, 1990 and November 21, 1990 proceedings (previously filed with this Court).

ROSENTHAL's appeal to this court was denied on April 4, 1991 without sanctions having been awarded, although requested, and his appeal to the California Supreme Court was denied April 18, 1991.

II

ROSENTHAL'S APPEAL WAS NOT FRIVOLOUS

ROSENTHAL contends that contrary to

the position of RPI and the Superior Court, there is no absolute requirement of a pending prosecution in judgment debtor proceedings before a litigant may rely on the Fifth Amendment privilege against self-incrimination, but only a subjective test: whether there is a reasonable apprehension of criminal prosecution.

Although there are other secondary issues which were raised in ROSENTHAL's petition for review of the Superior Court contempt order at issue here, the single most overriding issue is whether there must be a prosecution pending against a litigant, before the litigant, in judgment debtor proceedings, may claim the Fifth Amendment privilege in response to questions posed concerning the existence and location of his assets. While Real Party in Interest, ROBERT NOLAN CONRAD, A Law Corporation, has relief primarily on Troy vs. Superior Court, 186 CA3d 1006, it is respectfully submitted that Troy is not

dispositive, for reasons explained herein.

Moreover, even assuming arguendo that Troy is found to be dispositive, it is the duty of an attorney to zealously advocate his client's cause and seek clarification, modification, or even reversal of a decision which holds against his client. This is particularly true where, as here, the client has been deprived of his liberty for asserting the constitutional privilege against self-incrimination. For purposes of the privilege against self-incrimination, it has been held that the answer of a witness will be considered incriminating where it would expose him to the danger of criminal prosecution for a felony or misdemeanor. ROSENTHAL is not aware of any case which holds as a matter of law, that there must be a criminal prosecution pending before he can properly rely upon the Fifth Amendment privilege against self-incrimination. In Zonver vs. Superior Court, 270 Cal.App.2d 613, this court (2d District)

held that after Malloy vs. Hogan, 378 US 1, was decided, it became clear that California was,

> "compelled to enforce the prohibition against self-incrimination contained in the Fifth Amendment to the United States Constitution. One effect of Malloy was to make prior California cases refusing to apply the privilege against self-incrimination suspect since they had not necessarily applied federal standards." (Emphasis added)

Clearly, the federal standard is the standard which must be applied in this case. Just as this court found that the phalanx of state statutes in the field of sex provided ample justification for the exercise of the privilege in Zonver, ROSENTHAL respectfully submits that penal code sections 154 and 155, which he repeatedly urged in the judgment debtor proceedings as having been possibly

violated by him, likewise provide similar ample justification for ROSENTHAL's exercise of the privilege in this case. Needless to add, there was no pending prosecution in Zonver! "Possible state, as well as federal, self-incrimination is therefore at least as realistic here as it was in Malloy." Zonver, at pages 620-621; emphasis added) Moreover, Zonver pointed out, quoting from Cohen vs. Superior Court, 173 Cal.App.2d 68, "the witness does not have to demonstrate conclusively that the answers to the questions, will make him subject to prosecution, nor need he demonstrate that he likely would be convicted." (Id. at p. 621; emphasis added). The Zonver court concluded that, leaving aside state considerations, it had no doubt that the "liberality with which the Supreme Court considers the claims against self-incrimination as having been properly asserted," compelled the Zonver court to do the same. (Zonver, at p. 624).

To the extent that Troy and Zonver appear to be in conflict, ROSENTHAL was clearly within his rights in seeking appellate review of the contempt order.

It is further respectfully submitted that the chilling effect upon a litigant's rights to seek appellate review of a contempt order which incarcerates him and which also at the same time puts him and his counsel at risk of sanctions is a burden which is constitutionally impermissible.

This court apparently believes (because it denied ROSENTHAL's petition for review of the contempt order) that ROSENTHAL's fear of prosecution for having possibly violated penal codes section 154 and 155 (statutes which make it a crime to transfer/conceal assets from creditors) was not reasonable. But, manifestly, it is not frivolous on his part to ask a reviewing court to decide the issue.

The reapplication for sanctions

brings the entire question of the Fifth Amendment to the United States Constitution to bear. It is further respectfully submitted that ROSENTHAL, controversial and litigious though he may be, is still entitled to a court determination on a question by question basis of whether his fear is a "real danger" of being prosecuted. That was not done by either Commissioner Taylor or Judge O'Neil.

The Fifth Amendment, one of our most precious and sacred constitutional safeguards, secures life, liberty and property against deprivation without due process of law. In this setting, it remains clear that Rosenthal is entitled to a determination as to whether his reliance on the Fifth Amendment for fear of violating the aforementioned penal code sections was reasonable or not.

Moreover, the case mainly relied on by Real Party in Interest, Troy vs. Superior Court (1986) 186 Cal.App.3d 1006, supports Rosenthal's contention that he is entitled to

a court determination as to whether his fear of prosecution is reasonable in light of the specific circumstance, the content of the questions and the setting in which the questions are asked. As Troy notes, it is the trial court's function to determine whether such a "real danger" exists (Troy, at page 1011). Apparently, this court has determined that Rosenthal's fear was not reasonable. But that determination does not equate with a frivolous request. Rosenthal's liberty is at stake. He is absolutely constitutionally entitled to seek appellate review of the contempt order. Moreover, Troy notes that in order to establish that a litigant's fear of prosecution is reasonable, he must demonstrate some "nexus" between the information requested and the risk of a criminal prosecution and conviction. It is respectfully submitted that Rosenthal did in fact establish that "nexus" by relying repeatedly upon his apprehension of having violated penal code sections 154 and

155. Needless to add, Rosenthal's appeal in the related case, in fact the entire trial thereof, was based on the proposition that he conveyed certain rights and property to a professional law corporation, in order to protect the rights and property from possible creditors. Rosenthal has cited abundant case law in the related appeal for the proposition that such conduct does not equate with "unclean hands" on his part and that he is entitled to relief for reasons explained in his brief in that appeal.

Troy notes (page 10113) that "at present there is no criminal prosecution pending against Troy and as far as anyone knows there is not even an investigation which might lead to criminal prosecution." There is no language in Troy which holds as a matter of law that there must be a criminal prosecution pending before a litigant in judgment debtor proceedings can properly invoke the Fifth Amendment to the United States Constitution.

Yet, RPI, and apparently Judge O'Neil, believe that "real danger" means actual or threatened prosecution (RT March 5, 1991, p. 37 lines 4-17). Even if that is to be the holding of Troy, Rosenthal is entitled to seek court determination of whether his fear is reasonable without running the risk of sanctions. If that is in fact the holding of Troy, then it conflicts with Zonver, earlier decided by this court, and that conflict is further reason why this appeal was well taken. Further, Rosenthal is entitled to reply on the federal cases which do not hold that a pending criminal prosecution is a necessary prerequisite to reliance upon the Fifth Amendment fear of self-incrimination. Rosenthal is also clearly entitled to appellate review of the questions posed him in order to determine whether he has demonstrated the needed "nexus" between the risk of prosecution and the information requested.

While the court in Troy held that his

fear of inadvertently providing information which might cause him to be preyed upon by various prosecutorial agencies, was based upon pure speculation and not the existence of the "real danger" which must exist for Troy to properly invoke the Fifth Amendment privilege, the court did not specify the elements of that "real danger" which must exist before the Fifth Amendment could be properly asserted. Thus, the "real danger" standard itself appears to be impermissibly vague and in need of greater clarification. Rosenthal's appeal of the contempt order in essence invited this court to expand, clarify, or modify the "real danger" standard in Troy which was, and is, ambiguous as to what must be present before a litigant can properly assert the privilege. Clearly, seeking such a review is not frivolous.

RPI's reliance upon McMartin vs. Los Angeles County 202 Cal.App.3d 848, 860, is also misplaced. There, the court merely found

that the information required to be disclosed could not serve as a "link in the chain of evidence" in the case against plaintiff. Yet, here, answers to the questions posed in the judgment debtor proceedings might provide the requisite "link" because of Rosenthal's testimony that he may have violated penal code section 154 and 155. Yet, neither Commissioner Taylor nor Judge O'Neil made a particularized inquiry of Rosenthal, once he objected to certain questions.

Moreover, the federal cases cited in Troy support Rosenthal's position, when examined closely. Thus, the instant situation is clearly distinguishable from Brunswick Corp. v. Doff (9th Cir. 1981) 638 F2d 108, 110 where the debtor, Doff, provided "nothing other than a bald assertion of the privilege. In no way does it appear that more responsive answers would incriminate Doff." Rosenthal did much more than make such a bald assertion. In Baker v Limber, 647 F.2d 912, 917 (9th Cir.

1981), the court pointed out, inter alia, that APPELLANT did not provide any basis for believing that a responsive answer, or an explanation for his refusal to answer, would raise a danger of self-incrimination. Rosenthal provided such an explanation.

In United States vs. Neff, 615 F.2d 1235, 1240 (9th Cir. 1980), the court found that Neff's failure to answer questions on form 1040 concerning his financial and tax status was motivated more y a desire to protest taxes rather than a fear of self-incrimination. However, in so holding the court quoted from Judge Learned Hand's opinion in U.S. v Weisman, 111 F2d 260, 262 (2d Cir. 1940), as follows:

> "Obviously, a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the

> door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available." (Emphasis added.)

In Martin-Trigona v Gouletas, 634 F2d 354, 359 (7th Cir. 1980), the trial court upheld Trigona's right to assert the privilege as to certain of his assets. As to other questions the court directed Trigona to answer or explain more freely why responses to these other questions might be incriminating. The Superior Court never requested such an explanation from Rosenthal.

In U.S. v. Jones, 703 F2d 473 (19th Cir. 1983), the court upheld Jones' claim of privilege, despite the absence of any pending criminal tax charges against him. In so holding the court noted that,

> "If Robert Jones were under criminal investigation or indictment, the reasonableness of his fear that the information sought from his from his (sic) testimony might be used against him would be readily apparent. We think his fear is equally real in the instant case, because he is being prosecuted

civilly for failure to properly pay income taxes. Answers to questions concerning his financial affairs could easily provide links in a chain of evidence on criminal charges of attempt to evade payment of taxes." (Id. at p. 477; emphasis added).

The court in Jones also distinguished Capitol Products v. Herndon, 457 F2d 541 (8th Cir. 1972), as follows:

"We do not consider Capitol Products inconsistent with our holding in this case. The Eighth Circuit panel essentially affirmed the rule that, when the content of the statement does not alone reveal its incriminatory potential, the context in which it is asked must reveal such potential if the privilege is to be validly asserted. The Capitol Products court found neither aspect present. In the instant case, there was enough evidence to alert the court to the incriminatory potential of questions probing Jones' financial status." (Jones, at p. 477, fn. 3; emphasis added).

III

STATE LAW MUST GIVE WAY TO FEDERAL LAW WHERE THE FIFTH AMENDMENT IS CONCERNED

The supremacy of the federal government is expressed in Article VI of the

Federal Constitution:

> "This Constitution and the laws of the United States which shall be made in pursuant thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

See 7 Witkin, Summary of Cal. Law, 9th Ed., Constit. Law, Sec. 7, p. 49.

Accordingly, to the extent Troy v Superior Court conflicts with federal decisional law on the subject of invoking the privilege against self-incrimination, Troy must give way.

It is interesting to note that the reapplication brief is totally bereft of citations of federal cases on the subject of the Fifth Amendment privilege against self-incrimination. The reason is clear: federal law predominates over state law in this area and under federal law there is no requirement of a pending prosecution in order to rely on the Fifth Amendment. See, e.g. Malloy v

Hogan, supra. Troy cited and relied on several federal cases in reaching the conclusion that a witness's fears of self-incrimination must be real, not imaginary, and that it must be evident from the implication of the questions asked, their setting, "that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." (Troy, pp. 1010-1011; emphasis added; citations omitted).

Troy also explained that, "the privilege may not be asserted by merely declaring that an answer will incriminate." (Id. at page 1010.)

Here, Rosenthal did more than merely state that the answers might incriminate him. He explicitly relied on penal code sections 154 and 155 in refusing to answer. His testimony is clear: he may have violated those statutes. An example of questions asked and Rosenthal's answers are as follows: [The

question has relevance to item 6 on the subpoena duces tecum directed to Rosenthal; see Exh. "D" to the previously filed petition for writ of mandate, which asks for, "Any and all certificates of deposit in your name or held by a third person on your behalf within the past twelve (12) months."

Rosenthal's response (transcript of November 14, 1990 proceedings, p. 48) is as follows:

> "I hadn't finished my answer as to No. 6. I want to explain -- and ask Mr. Klein at the same time to supplement my explanation with his further questions - that if I were to answer such a question, I might be incriminating myself in violation of sections 154 and 155 of the Penal Code because such an answer would provide or may provide, or both, a link and [sic] a chain. For example, if there were a certificate of

deposit in my name, I could be, obviously having prior -- previously disclosed that, I could have been said to have concealed it, which is a direct violation of 154 and 155. Or held by a third person on my behalf, which is a second part of the question, within the last 12 months could have--could easily lead to the conclusion that I should be prosecuted or could be --could be prosecuted and--and held to be in violation of 154 and 155 on the theory of violation of the plain language of those two statutes which prohibit--on pain of imprisonment or fine, or both, which prohibit the transfer of an asset for the purpose of -- for the stated purpose in the statute."

Another example is as follows:

(See transcript of November 21, 1990

proceedings, p. 59; the answer refers to item 15 on the subpoena, which requested production of "Any and all documents which evidence personal property of value over $250 held or owned by others for you and/or on your behalf within the past twelve (12) months."

> "Yes. I refuse to answer on the ground that any answer might tend to incriminate me because implicit in the answer might very will (sic) be ultimate proof of my violation of the Penal Code sections 154 and 155 and subject me to the penalties of pain of imprisonment or both, that are specified in those two statutes. The -- by way of further explanation, any such document which would either on its face or by further interrogation or investigation or by use of legal process, procure the information that would incriminate me specifically, as I say, may indicate a violation of

any of 154 or 155 and -- in particular. And by way of illustration, but not restricted to, that may show a transfer of funds over $250 or any amount to others for the purposes that are proscribed in 154 and 155 of the Penal Code. There may be other means that further extend the danger or jeopardy to which I might be subjected if I were to answer that will be supplied by Mr. Klein either in argument or by any other means permitted by law or by other evidence may adduce from me or others."

Clearly, there is danger of incrimination evident from the answers provided by Rosenthal; there was and is a clear showing of a basis for his believing a responsive answer could incriminate him, or an explanation for his refusal would raise such a danger. There is thus much more here than a

"bald assertion of privilege." Bruinswick Corp. vs. Doff, 638 F.2d 108, 110 (9th Cir. 1981). There clearly exists an explanation of why "injurious disclosure could result." Hoffman v United States, 341 U.S. 479, 486-487 (1951). Thus, "in this setting", it cannot be and is not "perfectly clear, from a careful consideration of all circumstances in the case, that the witness is mistaken, in that the answer[s] cannot possibly have such tendency to incriminate." (Hoffman at page 488; emphasis in original.) Rosenthal's appeal was reasonable - his liberty was/is at stake. Some clarification of Troy and McMartin is needed, i.e., what is the "link in the chain of evidence" requirement referred to in those cases if it is not an explicit reliance on possible violations of specific penal code sections. How can the appeal be frivolous when Real Party In Interest has cited no case in which there was such reliance in judgment debtor proceedings. The law is

unclear; clarification is needed. It can scarcely be characterized as frivolous where a litigant seeks appellate review of his right to assert one of the most sacred constitutional privileges. As stated in Hoffman regarding the privilege against self-incrimination,

> "This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, 'was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed.'.....This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure.....The privilege afforded not only extends to answers that

> would in themselves support a conviction...but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant.....' If the witness upon interposing his claim were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee...." (Hoffman, at page 486.)

Rosenthal did more than merely claim the Fifth Amendment privilege in the abstract; he was specific as to why he felt it might be incriminatory to answer. If this answer is insufficient, some guidance from the court is necessary. It is not frivolous to ask for guidance where the law is unclear.

Not only is Rosenthal's appeal not

frivolous for the above stated reasons, it is further not frivolous because there is ample federal case law to support his position. For example, Estate of Fisher vs. Commissioner of Internal Revenue, 905 F.2d 645 (2d Cir. 1990) is compellingly relevant here. In Fisher, the second circuit rejected the Tax Court's reliance on IRS statements that Fisher was not being criminally investigated, as misplaced. The Second Circuit had previously rejected the approach that focused on the government's intention to prosecute in favor of one that looks only to whether to answering the question would tend to incriminate the witness. The court held that a witness need not go beyond the threshold showing of potential incrimination and be required to prove that the government will prosecute him in order to be entitled to the privilege. The claimant of the privilege may be forced to answer only when his fear of incrimination is unfounded. That fear cannot be held to be

sheer speculation here when founded on possible violation of specific penal code sections.

Further, the Superior Court declined to determine on a question by question basis, whether Rosenthal's 'claims of privilege could provide a link in the chain of evidence' necessary to prosecute him. Fisher, at p. 649.

IV

ROSENTHAL DID NOT MISLEAD THE COURT

There was no effort by Rosenthal or his counsel to mislead the Supreme Court. Neither Rosenthal nor his counsel are aware of any misstatements of law or fact in the briefs filed in the Court of Appeal or the Supreme Court. Certainly, none were pointed out in RPI's reapplication brief. The entire transcript of the judgment debtor proceedings on November 14, 1990 and November 20, 1990 were included with Rosenthal's Petition for

Writ of Mandate, as well as the proceedings of March 5, 1991. The court's order of contempt, March 5, 1991, was included as well. Thus, this court had the entire record first hand from which to make its ruling, a ruling which did not include sanctions, although previously requested. There was no intent by Rosenthal or counsel to mislead the Supreme Court, but only an effort to comply with C.R.C. 28, sub. (e)(6), which limits the length of the brief filed in that court.

By including the entire record, Rosenthal could not have misled this court, or any court, on a point of law or fact. Rosenthal merely referred to and quoted exactly the comments of Commissioner Taylor and Judge O'Neil that supported Rosenthal's version of the facts and law. Such an effort was not misleading, and this court has implicitly previously so found.

RPI accuses Rosenthal of not presenting key documents and a complete record

(RPI Brief, p. 10). Rule 28 (e)(6), however, limits the exhibits to 10 pages. Accordingly, Rosenthal did not include the entire evidentiary record which he submitted with his Petition for Writ of Mandate to this court. This court found noting misleading in Rosenthal's Writ.

CONCLUSION

Rosenthal's concern of pending or threatened prosecution was/is real. A judgment debtor's subjective reasonable fear of prosecution is sufficient to enable him to invoke the Fifth Amendment. Here Rosenthal testified repeatedly of his apprehension that he may have violated Penal Code Sections 154 and 155.

The petition for writ of mandate was certainly not frivolous where PETITIONER's very liberty was/is at stake. PETITIONER has a right to seek a possible clarification or modification of an existing case in such a situation, and his counsel have the duty to

advocate that position, because of the very fact his liberty was at stake.

Moreover, RPI made a previous request for sanctions when he filed his opposition to the petition for writ of mandate. No sanctions were ordered.

For all of the foregoing reasons it is respectfully requested that the reapplication be denied.

Dated: May 21, 1991.

Respectfully submitted,

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